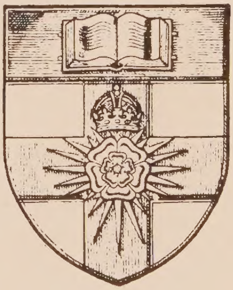
UNIVERSITY OF LONDON LIBRARY

THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

REFERENCE ONLY

346.4
Mx. North



UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-queens-bench_1951_1

1951

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

AND DECISIONS IN

THE COURT OF CRIMINAL APPEAL

EDITOR - - - - RALPH SUTTON, K.C.
ASSISTANT EDITOR - - R. C. CALBURN, *Barrister-at-Law*

REPORTERS:

Court of Appeal - - -
King's Bench,
Court of Criminal Appeal;
Appeals from County Courts.

H. C. GARSIA,
A. W. GRANT,
C. G. MORAN,
B. A. BICKNELL,
P. B. DURNFORD,
H. GREENFIELD,
R. P. COLINVAUX,
L. F. J. McDERMOTT,
J. L. DENISON,
S. M. F. COBON

Barristers-at-Law

1951—Vol. I.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 3 STONE BUILDINGS,
LINCOLN'S INN, LONDON, W.C.2,
AND
PRINTED BY THE EASTERN PRESS, LTD., LONDON AND READING

BIBL. LONDIN UNIV.

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES

MEMBERS OF THE COUNCIL

Chairman—J. H. Stamp, Esq.

Vice-Chairman—W. Price, Esq.

EX-OFFICIO MEMBERS

Right Hon. Sir Frank Soskice, K.C., M.P.	Attorney-General
Sir Lynn Ungoed-Thomas, K.C., M.P.	Solicitor-General
Sir Leonard Holmes, Esq., LL.M., J.P.	President of the Law Society

ELECTED MEMBERS

J. H. Stamp, Esq. The Right Hon. Lord Justice Jenkins	Lincoln's Inn
J. V. Nesbitt, Esq. R. E. Burrell, Esq., K.C.	Inner Temple
W. Price, Esq. W. Latey, Esq., M.B.E., K.C.	Middle Temple
The Hon. Mr. Justice McNair S. E. Pocock, Esq., O.B.E.	Gray's Inn
H. Edmund Davies, Esq., K.C. R. E. Megarry, Esq.	Appointed on the nomination of the General Council of the Bar
Sir Leslie Farrer, K.C.V.O. (Firm: Messrs. Farrer & Co.) G. D. Colclough, Esq. (Firm: Messrs. Johnson, Jecks & Landons)	The Law Society

Secretary—J. H. Bowman, Esq.
3 Stone Buildings, Lincoln's Inn, W.C.2

JUDGES

OF

THE COURT OF APPEAL

1951

Lord Jowitt, Lord Chancellor

Lord Goddard, Lord Chief Justice of England

Sir Francis Raymond Evershed, Master of the Rolls

Lord Merriman	President of the Probate, Divorce, and Admiralty Division

Sir Frederick James Tucker

Sir Alfred Townsend Bucknill

Sir Donald Bradley Somervell

Sir Lionel Leonard Cohen

Sir Cyril Asquith

Sir John Edward Singleton

Sir Alfred Thompson Denning

Sir David Lewellyn Jenkins

Sir William Norman Birkett

Sir Francis Lord Charlton Hodson

JUDGES

OF

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE

1951

Lord Goddard, Lord Chief Justice of England, President
Sir Travers Humphreys
Sir Malcolm Hilbery
Sir Roland Giffard Oliver
Sir Reginald Powell Croom-Johnson
Sir Wintringham Norton Stable
Sir James Dale Cassels
Sir Hugh Imbert Periam Hallett
Sir William Norman Birkett
Sir Gonne St. Clair Pilcher
Sir George Justin Lynskey
Sir Austin Ellis Lloyd Jones
Sir Laurence Austin Byrne
Sir John William Morris
Sir Frederick Aked Sellers
Sir Donald Leslie Finnemore
Sir Fred Eills Pritchard
Sir Geoffrey Hugh Benbow Streatfeild
Sir Gerald Osborne Slade
Sir Patrick Arthur Devlin
Sir Hubert Lister Parker
Sir Benjamin Ormerod
Sir William Gorman
Sir Patrick Redmond Joseph Barry
Sir Terence Norbert Donovan
Sir William Lennox McNair

Attorneys-General

Sir Hartley William Shawcross
Sir Frank Soskice

Solicitors-General

Sir Frank Soskice
Sir Arwyn Lynn Ungoed-Thomas

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 951, will be as follows:—

In the First Series,
[1951] Ch.
In the Second Series,
[1951] 1 K. B. [1951] 2 K. B. [1951] P.
In the Third Series,
[1951] A. C.

TABLE OF CASES REPORTED

IN THIS VOLUME

A

Adams *v.* Sunday Pictorial Newspapers (1920) Ld. and Champion - 354
Albury, Rex *v.* - 680
Alexander *v.* Springate - 803
American Economic Laundry Ld. *v.* Little - 400
Ardennes, S.S. (Cargo Owners) *v.* S.S. Ardennes (Owners) - 55
Aris-Bainbridge *v.* Turner Manufacturing Co. Ld. - 563

B

Bagnall, Howgate *v.* - 265
Barclays Bank Ld., Parkinson *v.* - 368
Barker *v.* Levinson - 342
Beadsley *v.* United Steel Companies Ld. - 408
Beaumont, *Ex parte*; Rex *v.* London Sessions - 557
Berry Wiggins & Co. Ld. (Third Parties). Biggin & Co. Ld. *v.* Permanite Ld. - 422
Bestwick, John M. Brown Ld. *v.* - 21
Biggin & Co. Ld. *v.* Permanite Ld. Berry Wiggins & Co. Ld. (Third Parties) - 422
Blond, Coleborn (T.) & Sons Ld. *v.* - 43
Boddington *v.* Wisson - 606
Boguslawski *v.* Gdynia-Ameryka Linie - 162
Bowes, *Ex parte*; Rex *v.* London Quarter Sessions - 383
Brazier, Pilbury *v.* - 340
Brickett, Stagg *v.* - 648
British Movietonews Ld. *v.* London and District Cinemas Ld. - 190
Brock *v.* Richards - 529
Bryce, Mills *v.* - 757
Burns *v.* Joseph Terry & Sons Ld. - 454
Burr, Garner *v.* - 31

C

Cann, Westwood *v.* - 325
Carpenter, Corkery *v.* - 102
Champion, Sunday Pictorial Newspapers (1920) Ld. and, Adams *v.* - 354
Chandris *v.* Isbrandtsen-Moller Co. Inc. - 240
Chapman, Frankenschwerth and, Regional Properties Co. Ld. *v.* - 631
Charles H. Challen & Son Ld., Clifford *v.* - 495
Chemical Cleaning and Dyeing Co., Curtis *v.* - 805
Chez Auguste Ld. *v.* Cottat - 292
Clayson *v.* Rolls Royce Ld. and Evans Lifts, Ld. - 746
Clifford *v.* Charles H. Challen & Son Ld. - 495
Cohen, J. T. Perrott & Co. Ld. *v.* - 705

PAGE
Cohen, Rex *v.* - - - - 505
Coleborn (T.) & Sons Ld. *v.* Blond - - - - - 43
Combs, R. M. R. Housing Society Ld. *v.* - - - 486
Cook *v.* Shoesmith - - 752
Corkery *v.* Carpenter - - 102
Cory (William) & Son Ld. *v.* London Corporation - - 8
Cottat, Chez Auguste Ld. *v.* 292
Cunningham-Howie *v.* F. W. Dimbleby & Sons Ld. - 360
Curtis *v.* Chemical Cleaning and Dyeing Co. - - - 805
Curtis *v.* Maloney - - - 736
Customs and Excise Commissioners *v.* E. Keil & Co. Ld. 469

D

Daley *v.* Diggers Ld. - - 661
Davies *v.* De Havilland Aircraft Co. Ld. - - - 50
De Havilland Aircraft Co. Ld., Davies *v.* - - - 50
Derby Corporation, Hotels Executive *v.* - - - 91
Diggers Ld., Daley *v.* - - 661
Dimbleby (F. W.) & Sons Ld., Cunningham-Howie *v.* - 360
Diment, Kat *v.* - - - 34
Drover *v.* Rugman - - 380
Duncan *v.* Graham - - 68
Dunsheath, Rex *v.*; *Ex parte* Meredith - - - - 127
Dyson, Holt *v.* - - - 364

E

Earl Fitzwilliam's Wentworth Estates Co. *v.* Minister of Town and Country Planning 203
East End Dwellings Co. Ld. *v.* Finsbury Borough Council - - - - - - 441
Egerton *v.* Rutter - - - 472
Eton Rural District Council, Walter *v.* - - - - 84
Evans Lifts Ld., Rolls Royce Ld. and, Clayson *v.* - - 746

F

PAGE
Fennell, Preston *v.* - - 16
Ferguson *v.* Weaving - - 814
Finsbury Borough Council, East End Dwellings Co. Ld. *v.* - - - - 441
Foster *v.* Robinson - - 149
Frankenschwerth and Chapman, Regional Properties Co. Ld. *v.* - - - - 631

G

Garner *v.* Burr - - - 31
Gdynia-Ameryka Linie, Boguslawski *v.* - - - 162
Good, Mint *v.* - - - 517
Goodman, *Ex parte*; Rex v. Hampstead and St. Pancras Rent Tribunal - - - 541
Gould *v.* Minister of National Insurance - - - - 731
Graham, Duncan *v.* - - 68
Grant, Rex *v.* - - - 500
Green, MacDonald *v.* - - 594
Greenhalgh, Shackleton *v.* - 725

H

Hampstead and St. Pancras Rent Tribunal, Rex *v.*; *Ex parte* Goodman - - - 541
Harris, Rex *v.* - - - 107
Havant and Waterloo Urban District Council, Higham *v.* 509
Hemmings, Roe *v.* - - 676
Heyes, Rex *v.* - - - 29
Higham *v.* Havant and Waterloo Urban District Council - - - - 509
Holloway *v.* Mobberley and Perry Ld. - - - - 316
Holt *v.* Dyson - - - 364
Honig, *Ex parte*; Rex *v.* London, etc., Rent Tribunal 641
Horton, Langdon *v.* - - 666
Hotels Executive *v.* Derby Corporation - - - 91
Howard *v.* Pickford Tool Co. Ld. - - - - - 417

PAGE

Howgate *v.* Bagnall - - 265
Howkins *v.* Jardine - - 614

I

Ilford Corporation, Nalder *v.* 822
Institution of Polish Engineers in Great Britain Ld., Jaworski *v.* - - - 768
Isbrandtsen-Moller Co. Inc., Chandris *v.* - - - 240

J

James *v.* Thomas H. Kent & Co. Ld. - - - - 551
Jardine, Howkins *v.* - - 614
Jaworski *v.* Institution of Polish Engineers in Great Britain, Ld. - - - 768
John M. Brown Ld. *v.* Bestwick - - - - - 21
Joseph Terry & Sons Ld., Burns *v.* - - - - 454

K

Kat *v.* Diment - - - 34
Keil (E.) & Co. Ld., Customs and Excise Commissioners *v.* - - - - - 469
Kerridge *v.* Lamdin - - 478
Kuwait Oil Co. Ld., Westminster Airways Ld. *v.* - 134

L

Lamdin, Kerridge *v.* - - 478
Langdon *v.* Horton - - 666
Levinson, Barker *v.* - - 342
Linnitt, Williams *v.* - - 565
Lipman, Newman *v.* - - 333
Little, American Economic Laundry Ld. *v.* - - - 400
London and District Cinemas Ld., British Movietonews Ld. *v.* - - - - 190
London Corporation, Cory (William) & Son Ld. *v.* - 8

PAGE

London Counties Newspapers, Sellers *v.* - - - - 784
London, etc., Rent Tribunal, Rex *v.*; *Ex parte* Honig - 641
London Quarter Sessions, Rex *v.*; *Ex parte* Bowes - 383
London Sessions, Rex *v.*; *Ex parte* Beaumont - - 557
Longdon-Griffiths *v.* Smith - 295

M

MacDonald *v.* Green - - 594
MacIver *v.* Robertson - - 338n
Maloney, Curtis *v.* - - 736
Matt, Rose *v.* - - - 810
Meredith, *Ex parte*; Rex *v.* Dunsheath - - - 127
Midland Counties Motor Finance Co. Ld. *v.* Slade - 346
Mills *v.* Bryce - - - 757
Minister of Food, Noemijulia Steamship Co. Ld. *v.* - 223
Minister of National Insurance, Gould *v.* - - - 731
Minister of Town and Country Planning, Earl Fitzwilliam's Wentworth Estates Co. *v.* - - - 203
Minister of Town and Country Planning, Rex *v.*; *Ex parte* Montague Burton Ld. - 1
Mint *v.* Good - - - 517
Mobberley & Perry Ld., Holloway *v.* - - - - 316
Montague Burton Ld., *Ex parte*; Rex *v.* Minister of Town and Country Planning 1
Moore *v.* Ray - - - 98
Morris, Rex *v.* - - - 394
Morris, Yates *v.* - - - 77
Murray, Rex *v.* - - - 391

N

Nalder *v.* Ilford Corporation - 822
Neath Rural District Council *v.* Williams - - - 115
Newman *v.* Lipman - - 333

PAGE

Noemijulia Steamship Co. Ld. *v.* Minister of Food - 223
Northumberland Compensation Appeal Tribunal, Rex *v.*; *Ex parte* Shaw - - 711

O

O'Dea *v.* Tetau - - - - 184
O'Meara *v.* South-Eastern Gas Board - - - - 307

P

Parkinson *v.* Barclays Bank Ld. - - - - - - 368
Parry, Rex *v.* - - - - 590
Peace, Willey *v.* - - - - 94
Pearson *v.* Rose & Young Ld. 275
Permanite Ld., Biggin & Co. Ld. *v.*; Berry Wiggins & Co. Ld. (Third Parties) - 422
Perrott (J. T.) & Co. Ld. *v.* Cohen - - - - - 705
Perry, Tinkham *v.* - - 547
Pickford Tool Co. Ld., Howard *v.* - - - - 417
Pilbury *v.* Brazier - - 340
Pople, Rex *v.* - - - - 53
Preston *v.* Fennell - - 16
Protheroe *v.* The Railway Executive - - - - 376

R

R.M.R. Housing Society Ld. *v.* Combs - - - - - 486
Railway Executive, Protheroe *v.* - - - - - - 376
Ray, Moore *v.* - - - - 98
Regional Properties Co. Ld. *v.* Frankenschwerth and Chapman - - - - - 631
Regor Estates Ld. *v.* Wright - 689
Rex *v.* Albury - - - - 680
Rex *v.* Cohen - - - - 505
Rex *v.* Dunsheath; *Ex parte* Meredith - - - - - 127
Rex *v.* Grant - - - - 500

PAGE

Rex *v.* Hampstead and St. Pancras Rent Tribunal; *Ex parte* Goodman - - - - 541
Rex *v.* Harris - - - - 107
Rex *v.* Heyes - - - - 29
Rex *v.* London, etc., Rent Tribunal; *Ex parte* Honig - 641
Rex *v.* London Quarter Sessions; *Ex parte* Bowes - 383
Rex *v.* London Sessions; *Ex parte* Beaumont - - 557
Rex *v.* Minister of Town and Country Planning; *Ex parte* Montague Burton Ld. - 1
Rex *v.* Morris - - - - 394
Rex *v.* Murray - - - - 391
Rex *v.* Northumberland Compensation Appeal Tribunal; *Ex parte* Shaw - . - - 711
Rex *v.* Parry - - - - 590
Rex *v.* Pople - - - - 53
Rex *v.* Sandbach Justices; *Ex parte* Smith - - - 62
Rex *v.* Sidmouth Rent Tribunal; *Ex parte* Sellek - 778
Richards, Brock *v.* - - 529
Robertson, MacIver *v.* - - 338n
Robinson, Foster *v.* - - 149
Roe *v.* Hemmings - - - 676
Rolls Royce Ld. and Evans Lifts Ld., Clayson *v.* - 746
Rose *v.* Matt - - - - 810
Rose & Young Ld., Pearson *v.* - - - - - - 275
Rugman, Drover *v.* - - 380
Rutter, Egerton *v.* - - 472

S

Sandbach Justices, Rex *v.*; *Ex parte* Smith - - - 62
Sellek, *Ex parte*; Rex *v.* Sidmouth Rent Tribunal - 778
Sellers *v.* London Counties Newspapers - - - - 784
Shackleton *v.* Greenhalgh - 725
Shaw, *Ex parte*; Rex *v.* Northumberland Compensation Appeal Tribunal - - 711

PAGE
Shoesmith, Cook *v.* - - 752
Sidmouth Rent Tribunal, Rex *v.*; *Ex parte* Sellek - - 778
Slade, Midland Counties Motor Finance Co. Ld. *v.* 346
Smith, *Ex parte*; Rex *v.* Sandbach Justices - - 62
Smith, Longdon-Griffiths *v.* - 295
South-Eastern Gas Board, O'Meara *v.* - - - 307
Springate, Alexander *v.* - 803
Stagg *v.* Brickett - - - 648
Sunday Pictorial Newspapers (1920) Ld. and Champion, Adams *v.* - - - - 354

T

Tetau, O'Dea *v.* - - - 184
Thomas H. Kent & Co. Ld., James *v.* - - - - 551
Tinkham *v.* Perry - - - 547
Turner Manufacturing Co. Ld., Aris-Bainbridge *v.* - 563

PAGE

U

United Steel Companies Ld., Beadsley *v.* - - - 408

W

Walter *v.* Eton Rural District Council - - - - 84
Weaving, Ferguson *v.* - - 814
Westminster Airways Ld. *v.* Kuwait Oil Co. Ld. - - 134
Westwood *v.* Cann - - 325
Whitehouse, *In re* - - - 673
Willey *v.* Peace - - - 94
Williams *v.* Linnitt - - 565
Williams, Neath Rural District Council *v.* - - - 115
Wiltshire, Winkle *v.* - - 684
Winkle *v.* Wiltshire - - 684
Wisson, Boddington *v.* - - 606
Wright, Regor Estates Ld. *v.* 689

Y

Yates *v.* Morris - - - 77

TABLE OF CASES CITED AND JUDICIALLY NOTICED

ABBREVIATIONS

Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

Ackroyds Air Travel Co. Ld. *v.* Director of Public Prosecutions	48 L. G. R. 398		Ferguson *v.* Weaving . . .	814
Adam Steamship Co. *v.* London Assurance Corporation	[1914] 3 K. B. 1256	*C.*	Westminster Airways Ld. *v.* Kuwait Oil Co. Ld.	134
Adams *v.* Naylor . .	[1946] A. C. 543	*C.*	Howgate *v.* Bagnall . . .	265
Aga Khan *v.* Times Publishing Co. Ld.	[1924] 1 K. B. 675, 682	*F.*	Cunningham-Howie *v.* F. W. Dimbleby & Sons Ld. .	360
Aksionairnoye Obschestvo A. M. Luther *v.* James Sagor & Co.	[1921] 3 K. B. 532	*R.*	Boguslawski *v.* Gdynia-Ameryka Linie . . .	162
Allard *v.* Selfridge & Co. Ld.	[1925] 1 K. B. 129	*C.*	Kat *v.* Diment .	34
Allen *v.* Whitehead . .	[1930] 1 K. B. 211		Ferguson *v.* Weaving . . .	814
Amand, *In re* . . .	[1941] 2 K. B. 239	*R.*	Boguslawski *v.* Gdynia-Ameryka Linie . . .	162
Ambatielos *v.* Anton Jurgens Margarine Works	[1923] A. C. 175		Noemijulia Steamship Co. Ld. *v.* Minister of Food	223
Anderson *v.* Anderson .	[1895] 1 Q. B. 749	*Appl.*	Chandris *v.* Isbrandtsen-Moller Co. Inc. . .	240
Anderson *v.* Bank of British Columbia	2 Ch. D. 644 .	*C.*	Westminster Airways Ld. *v.* Kuwait Oil Co. Ld.	134
Arantzazu Mendi, The .	[1939] A. C. 256	*R.*	Boguslawski *v.* Gdynia-Ameryka Linie . .	162
Ardan Steamship Co. *v.* Andrew Weir & Co.	6 F. 294; [1905] A. C. 501	*R.*	Chandris *v.* Isbrandtsen-Moller Co. Inc. . .	240
Arlidge *v.* Tottenham U. D. C.	[1922] 2 K. B. 719	*R.*	Nalder *v.* Ilford Corporation .	822
Armement Adolf Deppe *v.* John Robinson & Co. Ld.	[1917] 2 K. B. 204	*R.*	Noemijulia Steamship Co. Ld. *v.* Minister of Food	223
Artillery Mansions Ld. *v.* Macartney	[1949] 1 K. B. 164	*R.*	Stagg *v.* Brickett .	648
A/S Frank *v.* Namaqua Copper Co. Ld.	36 T. L. R. 438	*R.*	Chandris *v.* Isbrandtsen-Moller Co. Inc. . .	240
A/S Reidar *v.* Arcos Ld. .	[1926] 2 K. B. 83; [1927] 1 K. B. 352	*E.*	Chandris *v.* Isbrandtsen-Moller Co. Inc. . .	240
Asher *v.* Seaford Court Estates Ld.	[1949] 2 K. B. 481; [1950] A. C. 508	*R.*	Mills *v.* Bryce .	757
Artizans, Labourers and General Dwellings Co. Ld. *v.* Whitaker	[1919] 2 K. B. 301	*R.*	R.M.R. Housing Society Ld. *v.* Combs . .	486
Atkinson *v.* Sellers . .	5 C. B. (N.S.) 442	*R.*	Williams *v.* Linnitt	565
Attorney-General for Palestine *v.* Fakhry Ayyas	[1947] A. C. 332	*F.*	Roe *v.* Hemmings	676

Attorney-General *v.* Smithies	1 Keen 289	*C.*	Rex *v.* Dunsheath	127
Att.-Gen. *v.* Stephens	1 Atk. 358		Rex *v.* Dunsheath	127
Att.-Gen. *v.* Talbot	3 Atk. 662	*C.*	Rex *v.* Dunsheath	127
Att.-Gen. *v.* Tod-Heatley	[1897] 1 Ch. 560	*R.*	Neath Rural D. C. *v.* Williams	115
Baily *v.* De Crespigny	L. R. 4 Q. B. 180		Regor Estates Ld. *v.* Wright	689
Banco de Bilbao *v.* Sancha	[1938] 2 K. B. 176	*C.*	Boguslawski *v.* Gdynia-Ameryka Linie	162
Banks *v.* Cope-Brown	[1948] 2 K. B. 487		Shackleton *v.* Greenhalgh	725
Barker *v.* Herbert	[1911] 2 K. B. 645	*R.*	Mint *v.* Good	517
Barker *v.* Levinson	[1951] 1 K. B. 342		Ferguson *v.* Weaving	814
Barrell *v.* Fordree	[1932] A. C. 676	*R.*	Shackleton *v.* Greenhalgh	725
Barrett *v.* Hardy Baros. (Alnwick) Ld.	[1925] 2 K. B. 220		Rex *v.* Sidmouth Rent Tribunal	778
Bartlett *v.* Smith	12 L. J. (Ex.) 287		Rex *v.* Murray	391
Barton *v.* Fincham	[1921] 2 K. B. 291	*Appl.*	R.M.R. Housing Society Ld. *v.* Combs	486
Bastin *v.* Davies	[1950] 2 K. B. 579	*R.*	Moore *v.* Ray	98
Baxter *v.* Eckersley	[1950] 1 K. B. 480	*R.*	Mills *v.* Bryce	757
Beaumont-Thomas *v.* Blue Star Line Ld.	55 T. L. R. 852	*R.*	Chandris *v.* Isbrandtsen-Moller Co. Inc.	240
Bennett *v.* Mellor	5 Term R. 273	*C.*	Williams *v.* Linnitt	565
Bennett, Walden & Co. *v.* Wood	[1950] 2 All E. R. 134	*R.*	British Movietonews, Ld. *v.* London and District Cinemas Ld.	190
Berkhampstead School, *Ex p.*	2 V. & B. 134		Rex *v.* Dunsheath	127
Berners *v.* Fleming	[1925] Ch. 264		Cory (William) & Son Ld. *v.* London Corporation	8
Berry *v.* Berry	[1929] 2 K. B. 316	*R.*	Perrott (J. F.) & Co. Ld. *v.* Cohen	705
Bettany *v.* Eastern Morning and Hull News Co. Ld.	16 T. L. R. 401		Sellers *v.* London Counties Newspapers	784
Bidie, *In re*	[1949] Ch. 121	*Dist.*	Tinkham *v.* Perry	547
Bilbee *v.* Hasse & Co.	5 T. L. R. 677; *The Times*, Jan. 16, 1890	*C.*	Sellers *v.* London Counties Newspapers	784
Billings *v.* Reed	[1945] K. B. 11	*R.*	Howgate *v.* Bagnall	265
Binding *v.* Great Yarmouth Port and Haven Commissioners	16 B. W. C. C. 28	*R.*	Gould *v.* Minister of National Insurance	731
Birmingham and Midland Motor Omnibus Co. Ld. *v.* London & North Western Ry. Co.	[1913] 3 K. B. 850	*C.*	Westminster Airways Ld. *v.* Kuwait Oil Co. Ld.	134
Bishopsgate Motor Finance Corporation	[1949] 1 K. B. 322	*R.*	Pearson *v.* Rose & Young Ld.	275
Blackpool Corporation *v.* Locker	[1948] 1 K. B. 349		Rex *v.* Minister of Town and Country Planning	1

Blain, *Ex parte*. *In re* Sawers	12 Ch. D. 52		Howgate *v.* Bagnall	265
Blount *v.* Blount	[1916] 1 K. B. 230	*R.*	Jaworski *v.* Institution of Polish Engineers in Great Britain Ld.	768
Blyth, *Ex parte*	[1944] K. B. 532		Whitehouse, *In re*	673
Board of Trade *v.* Temperley Shipping Co. Ld.	26 Ll. L. Rep. 76; 27 Ll. L. Rep. 230		Cory (William) & Son Ld. *v.* London Corporation	8
Boguslawski *v.* Gdynia-Ameryka Linie	[1950] 1 K. B. 157	*Aff.*	Boguslawski *v.* Gdynia-Ameryka Linie	162
Bolsover Colliery Co. Ld. *v.* Abbott	[1946] K. B. 8	*Appl.*	American Economic Laundry Co. Ld. *v.* Little	400
Booth *v.* Booth	[1922] 1 K. B. 66	*R.*	Jaworski *v.* Institution of Polish Engineers in Great Britain Ld.	768
Borthwick-Norton *v.* Romney Warwick Estates Ld.	[1950] 1 All E. R. 798	*R.*	Yates *v.* Morris	77
Bowditch *v.* Wakefield Local Board	L. R. 6 Q. B. 567	*R.*	Nalder *v.* Ilford Corporation	822
Bowker *v.* Woodroffe	[1928] 1 K. B. 217		Ferguson *v.* Weaving	814
Bowness *v.* O'Dwyer	[1948] 2 K. B. 219	*Appl.*	Stagg *v.* Brickett	648
Boyd *v.* Mathers and "South Africa" (Ld.)	9 T. L. R. 443	*R.*	Sellers *v.* London Counties Newspapers	784
Brand *v.* Glasse	Moore K. B. 159	*Appl.*	Williams *v.* Linnitt	565
Britain *v.* Rossiter	11 Q. B. D. 123	*F.*	James *v.* Thomas H. Kent & Co. Ld.	551
British Oil and Cake Co. Ld. *v.* Burstall & Co.	39 T. L. R. 406	*R.*	Biggin & Co. Ld. *v.* Permanite Ld.	422
British Salicilates Ld., *In re*	[1919] 2 Ch. 155		Midland Counties Motor Finance Co. Ld. *v.* Slade	346
British Westinghouse Electric and Manufacturing Co. Ld. *v.* Underground Electric Railways of London Ld.	[1912] A. C. 673	*R.*	Biggin & Co. Ld. *v.* Permanite Ld.	422
Brock *v.* Wollams	[1949] 2 K. B. 388	*Appl.*	Langdon *v.* Horton	666
Brown *v.* Draper	[1944] K. B. 309	*C.*	American Economic Laundry Co. Ld. *v.* Little	400
		R.	Foster *v.* Robinson	149
		R.	R.M.R. Housing Society Ld. *v.* Combs	486
Brown *v.* Robins	[1943] 1 All E. R. 548	*Dist.*	Stagg *v.* Brickett	648
Buck *v.* Howarth	63 T. L. R. 195		Foster *v.* Robinson	149
Burrell & Sons *v.* F. Green & Co.	[1914] 1 K. B. 293	*R.*	Chandris *v.* Isbrandtsen-Moller Co. Inc.	240

Bush *v.* Whitehaven Trustees	52 J. P. 392. Hudson's Building Contracts, Vol. 2 (4th ed.) 122	*R.*	British Movietonews, Ld. *v.* London and District Cinemas Ld.	190
Bute (Marquis) *v.* Prenderleith	1921 S. C. 281	*C.*	R.M.R. Housing Society Ld. *v.* Combs . .	486
Buttery *v.* Pickard . .	62 T. L. R. 241	*R.*	Foster *v.* Robinson	149
Cahn *v.* Pocketts Bristol Channel Steam Packet Co.	[1899] 1 Q. B. 643		Pearson *v.* Rose & Young Ld. .	275
Cakebread *v.* Hoppings Brothers (Whetstone) Ld.	[1947] K. B. 641		Clifford *v.* Charles H. Challen & Son Ld. . .	495
Calye's Case . . .	8 Co. Rep. 32a	*C.*	Williams *v.* Linnitt	565
Cannan *v.* Abingdon (Earl)	[1900] 2 Q. B. 66	*R.*	Corkery *v.* Carpenter . . .	102
Canterbury Corporation *v.* Cooper	100 L. T. 597 .		Foster *v.* Robinson	149
Carlton, *In re* . . .	[1945] Ch. 280		O'Meara *v.* South-Eastern Gas Board . .	307
Carr's Case . . .	1 Roll. Ab. 3 (e)	*R.*	Williams *v.* Linnitt	565
Carr *v.* Mercantile Produce Co. Ld.	[1949] 2 K. B. 601		Burns *v.* Joseph Terry & Sons Ld. . . .	454
Carroll *v.* Andrew Barclay & Sons Ld.	[1948] A. C. 477	*R.*	Burns *v.* Joseph Terry & Sons Ld. . . .	454
Central London Property Trust Ld. *v.* High Trees House Ld.	[1947] K. B. 130	*Appl.*	Perrott (J. F.) & Co. Ld. *v.* Cohen	705
Chalmers *v.* Speedwell Wire Co. Ld.	1942 S. C. (J.) 42	*R.*	Burns *v.* Joseph Terry & Sons Ld. . . .	454
Chamberlain *v.* Farr .	112 L. J. (K. B.) 206	*R.*	Stagg *v.* Brickett .	648
Chandris *v.* Isbrandtsen-Moller Co. Inc.	[1950] 1 All E. R. 768	*R.*	British Movietonews, Ld. *v.* London and District Cinemas Ld.	190
Chapelton *v.* Barry Urban District Council	[1949] 1 K. B. 532	*R.*	Curtis *v.* Chemical Cleaning and Dyeing Co. .	805
Chaplin *v.* Hicks . .	[1911] 2 K. B. 786	*R.*	Biggin & Co. Ld. *v.* Permanite Ld.	422
Chapman *v.* Speller . .	1 Q. B. 621		Curtis *v.* Maloney	737
Chasteney *v.* Michael Nairn & Co.	[1937] 1 All E. R. 376	*C.*	Burns *v.* Joseph Terry & Sons Ld. . . .	454
Christie *v.* Leachinsky .	[1947] A. C. 573		Willey *v.* Peace .	94
Christie, Manson & Woods *v.* Cooper	[1900] 2 Q. B. 522		Kat *v.* Diment .	34
Church *v.* Brown . .	15 Ves. 258, 265	*F.*	Cook *v.* Shoesmith	752
Clanricarde (Marquess) *v.* Congested Districts Board	13 L. G. R. 415	*R.*	Earl Fitzwilliam's Wentworth Estates Co. *v.* Minister of Town and Country Planning . . .	203
Clarke *v.* Clarke . .	[1943] P. 1 .		Rex *v.* Sandbach Justices . .	62
Clarke *v.* Southern Ry. Co.	20 B. W. C. C. 309	*R.*	Rex *v.* Northumberland Compensation Appeal Tribunal . .	711

Clayton *v.* Sale Urban District Council	[1926] 1 K. B. 415	*C.*	Neath Rural D. C. *v.* Williams	115
Clift *v.* Taylor	[1948] 2 K. B. 394		Kerridge *v.* Lamdin	478
Cockhill *v.* Davies	[1943] K. B. 508	*Dist.*	Rex *v.* London Quarter Sessions; *Ex parte* Bowes	383
Cole *v.* North Western Bank	L. R. 10 C. P. 354	*R.*	Pearson *v.* Rose & Young Ld.	275
Collins *v.* London General Omnibus Co.	63 L. J. (Q. B.) 428	*R.*	Westminster Airways Ld. *v.* Kuwait Oil Co. Ld.	134
Collman *v.* Mills	[1897] 1 Q. B. 396	*R.*	Barker *v.* Levinson	342
Colton *v.* Becollda Property Investment Ld.	[1950] 1 K. B. 216	*R.*	Regor Estates Ld. *v.* Wright	689
Connolly Shaw *v.* A/S Det Nordenfjeldske D/S	49 Ll. L. Rep. 183		S.S. Ardennes (Cargo Owners) *v.* S.S. Ardennes (Owners)	55
Constantine (Joseph) Steamship Line Ld. *v.* Imperial Smelting Corporation Ld.	[1942] A. C. 154	*Appl.*	British Movietonews, Ld. *v.* London and District Cinemas Ld.	190
Coss *v.* National Maternity Hospital	Unreported		Westminster Airways Ld. *v.* Kuwait Oil Co. Ld.	134
Cramb *v.* Goodwin	35 T. L. R. 477	*R.*	Sellers *v.* London Counties Newspapers	784
Cricklewood Property and Investment Trust Ld. *v.* Leighton's Investment Trust Ld.	[1945] A. C. 221		British Movietonews, Ld. *v.* London and District Cinemas Ld.	190
Crocker Horlock Ld. *v.* B. Lang & Co. Ld.	[1949] 1 All E. R. 526	*Dist.*	Sellers *v.* London Counties Newspapers	784
Crooks *v.* Allan	5 Q. B. D. 38	*R.*	S.S. Ardennes (Cargo Owners) *v.* S.S. Ardennes (Owners)	55
Croston *v.* Vaughan	[1938] 1 K. B. 530	*Dist.*	Clayson *v.* Rolls Royce Ld. and Evans Lifts Ld.	746
Crowley *v.* Vitty	7 Ex. 319		Foster *v.* Robinson	149
Crozier *v.* Wishart Books Ld.	[1936] 1 K. B. 471	*R.*	Longdon-Griffiths *v.* Smith	295
Crusoe *v.* Bugby	2 Wm. Bl. 766	*R.*	Cook *v.* Shoesmith	752
Cryan *v.* Hotel Rembrandt	41 T. L. R. 287	*R.*	Williams *v.* Linnitt	565
Cumming *v.* Danson	112 L. J. (K. B.) 145	*R.*	Regional Properties Co. Ld. *v.* Frankenschwerth and Chapman	631
Cundy *v.* Le Cocq	13 Q. B. D. 207	*R.*	Ferguson *v.* Weaving	814
Cunliffe *v.* Goodman	[1950] 2 K. B. 237		Parkinson *v.* Barclays Bank Ld.	368
Dalrymple's Trustees *v.* Brown	1945 S. C. 190	*R.*	Regional Properties Co. Ld. *v.* Frankenschwerth and Chapman	631
Darling *v.* Raeburn	[1907] 1 K. B. 486	*R.*	Noemijulia Steamship Co. Ld. *v.* Minister of Food	223
Davies *v.* Thomas Owen & Co.	[1919] 2 K. B. 39	*R.*	Burns *v.* Joseph Terry & Sons Ld.	454
Davies *v.* Warwick	[1943] K. B. 329	*R.*	Stagg *v.* Brickett	648

Deen *v.* Davies . .	[1935] 2 K. B. 282		Brock *v.* Richards	529
Delaware, The . . .	14 Wall. 579 .		S.S. Ardennes (Cargo Owners) *v.* S.S. Ardennes (Owners) . .	55
Denny, Mott and Dickson *v.* James B. Fraser & Co. Ld.	[1944] A. C. 265	*Appl.*	British Movietonews Ld. *v.* London and District Cinemas Ld.	190
Dexters Ld. *v.* Hill Crest Oil Co. (Bradford) Ld.	[1926] 1 K. B. 348	*R.*	Biggin & Co. Ld. *v.* Permanite Ld.	422
Dickins *v.* Gill . .	[1896] 2 Q. B. 310		Winkle *v.* Wiltshire . . .	684
Dobell (G. C.) & Co. Ld. *v.* Barber & Garrat	[1931] 1 K. B. 219	*R.*	Biggin & Co. Ld. *v.* Permanite Ld.	422
Doe *d.* Lord Huntingtower *v.* Culliford	4 D. & R. 248 .	*R.*	Chez Auguste Ld. *v.* Cottat . .	292
Doe *v.* Hogg . . .	4 D. & R. 226	*R.*	Cook *v.* Shoesmith	752
Doe *v.* Williams . .	6 B. & C. 41 .	*R.*	Egerton *v.* Rutter	472
Donegal Tweed Co. *v.* Stephenson	45 T. L. R. 503	*R.*	Kerridge *v.* Lamdin	478
Donoghue *v.* Stevenson .	[1932] A. C. 562	*R.*	Brock *v.* Richards	529
Dreyfus (Louis) & Co. *v.* National Steamship Co.	[1935] 2 K. B. 313	*R.*	Noemijulia Steamship Co. Ld. *v.* Minister of Food	223
Drope *v.* Thaire . .	Latch 123 .	*R.*	Williams *v.* Linnitt	565
Dunn *v.* Bucknall Bros. .	[1902] 2 K. B. 614	*R.*	S.S. Ardennes (Cargo Owners) *v.* S.S. Ardennes (Owners) . .	55
Dunn *v.* Fidoe . . .	[1950] W. N. 419	*C.*	Howkins *v.* Jardine	614
Dunn *v.* Reg. . . .	12 Q. B. 1031 .		Rex *v.* London Sessions; *Ex p.* Beaumont . .	557
Dunville, *In re* . . .	[1947] N. I. 64		Jaworski *v.* Institution of Polish Engineers in Great Britain Ld.	768
Dyke *v.* Elliott . .	L. R. 4 P. C. 184	*R.*	Beadsley *v.* United Steel Companies Ld. . . .	408
East End Dwellings Co. Ld. *v.* Finsbury Borough Council	[1950] W. N. 285	*Rev.*	East End Dwellings Co. Ld. *v.* Finsbury Borough Council . .	441
Edwards *v.* Great Western Ry. Co.	11 C. B. 588 .	*Appl.*	Chandris *v.* Isbrandtsen-Moller Co. Inc. . .	240
Edwards *v.* Hall . .	[1949] 1 All E. R. 392		Boddington *v.* Wisson . .	607
Elliott *v.* Garrett . .	[1902] 1 K. B. 870		Adams *v.* Sunday Pictorial Newspapers (1920) Ld. and Champion .	354
Ellis & Sons Amalgamated Properties Ld. *v.* Sisman	[1948] 1 K. B. 653	*C.*	Brown (John M.) Ld. *v.* Bestwick East End Dwellings Co. Ld. *v.* Finsbury Borough Council . .	21 441
Emerson *v.* Woods . .	[1942] N. I. 118	*F.*	Roe *v.* Hemmings	676
Eves, *In re* . . .	55 T. L. R. 961		Jaworski *v.* Institution of Polish Engineers in Great Britain Ld. . . .	768

Eyre *v.* Haynes	62 T. L. R. 63		Rex *v.* Sidmouth Rent Tribunal	778
Fardon *v.* Harcourt-Rivington	146 L. T. 391	*R.*	Brock *v.* Richards	529
Fenner *v.* Blake	[1900] 1 Q. B. 426		Foster *v.* Robinson	149
Finch *v.* Bannister	[1908] 1 K. B. 485, 2 K. B. 441	*R.*	Neath Rural D. C. *v.* Williams	115
Finch *v.* Telegraph Construction and Maintenance Co.	65 T. L. R. 153	*R.*	Clifford *v.* Charles H. Challen & Sons Ld.	495
Findlay *v.* Newman, Hender & Co. Ld.	[1937] 4 All E. R. 58	*C.*	Burns *v.* Joseph Terry & Sons Ld.	454
Finlay (James) & Co. Ld. *v.* N. V. Kwik Hoo Tong Handel Maatschappij	[1929] 1 K. B. 100	*R.*	Biggin & Co. Ld. *v.* Permanite Ld.	422
Fisher *v.* Val de Travers Asphalte Co.	1 C. P. D. 511	*R.*	Biggin & Co. Ld. *v.* Permanite Ld.	422
Folkes *v.* King	[1923] 1 K. B. 282	*C.*	Pearson *v.* Rose & Young Ld.	275
Forster *v.* Baker	[1910] 2 K. B. 636	*R.*	Longdon-Griffiths *v.* Smith	295
Foster *v.* Robinson	[1951] 1 K. B. 149		American Economic Laundry Co. Ld. *v.* Little	400
Foundling Estates Ld. *v.* Tarnow	[1948] E. G. D. 273		American Economic Laundry Co. Ld. *v.* Little	400
Fowler *v.* Cripps	[1906] 1 K. B. 16		Kat *v.* Diment	34
Franklin *v.* Gramophone Co. Ld.	[1948] 1 K. B. 542	*R.*	Burns *v.* Joseph Terry & Sons Ld.	454
Frazer, *In re.* Frazer *v.* Hughes	[1941] Ch. 326		Jaworski *v.* Institution of Polish Engineers in Great Britain Ld.	768
French *v.* Champkin	[1920] 1 K. B. 76	*R.*	Coleborn (T.) & Sons Ld. *v.* Blond	43
Fuentes *v.* Montis	L. R. 3 C. P. 284		Pearson *v.* Rose & Young Ld.	275
Galloway *v.* London Corporation	L. R. 1 H. L. 34	*R.*	Earl Fitzwilliam's Wentworth Estates Co. *v.* Minister of Town and Country Planning	203
Gamble *v.* Jordan	[1913] 3 K. B. 149	*R.*	Coleborn (T.) & Sons Ld. *v.* Blond	43
Gammans *v.* Ekins	[1950] 2 K. B. 328	*Appl.*	Langdon *v.* Horton	666
Gee *v.* Hazleton	[1932] 1 K. B. 179		Howkins *v.* Jardine	614
Gee, Walker & Slater Ld. *v.* Friary Hotel	66 (Pt. 1) T. L. R. 59	*R.*	Williams *v.* Linnitt	565
Gerahty *v.* Baines & Co. Ld.	19 T. L. R. 554	*R.*	Sellers *v.* London Counties Newspapers	784
Giles *v.* Walker	24 Q. B. D. 656	*R.*	Neath Rural D. C. *v.* Williams	115
Gillmore *v.* London County Council	159 L. T. 615	*F.*	Protheroe *v.* Railway Executive	376
Gliksten (J.) & Son Ld. *v.* Green	[1929] A. C. 381	*Appl.*	Aris-Bainbridge *v.* Turner Manufacturing Co. Ld.	563

Glynn *v.* Margetson & Co.	[1893] A. C. 351	*R.*	Chandris *v.* Isbrandtsen-Moller Co. Inc. . .	240
Gordon's Settlement, *In re*	[1924] 1 Ch. 146		Jaworski *v.* Institution of Polish Engineers in Great Britain Ld.	768
Gould & Co. Ld. *v.* Houghton	[1921] 1 K. B. 509		Ferguson *v.* Weaving . . .	814
Grampian S.S. Co. Ld. *v.* Carver & Co.	9 T. L. R. 210	*R.*	Noemijulia Steamship Co. Ld. *v.* Minister of Food	223
Gray *v.* Owen . . .	[1910] 1 K. B. 623		Parkinson *v.* Barclays Bank Ld. .	368
Green *v.* Berliner . .	[1936] 2 K. B. 477	*R.*	Longdon - Griffiths *v.* Smith . .	295
Greene *v.* Groome . .	[1908] 1 K. B. 277		Rex *v.* Grant .	500
Greenfield *v.* London & North Eastern Ry. Co.	[1945] K. B. 89	*C.*	Howgate *v.* Bagnall . . .	265
Greenough *v.* Gaskell .	1 My. & K. 98	*R.*	Westminster Airways Ld. *v.* Kuwait Oil Co. Ld.	134
Gretton's Indenture, *In re*	[1923] 1 Ch. 77		Jaworski *v.* Institution of Polish Engineers in Great Britain Ld. . . .	768
Griffiths *v.* Studebakers Ld.	[1947] 1 K. B. 102		Barker *v.* Levinson	342
Grimston *v.* An Innkeeper	Hetley 49 .	*R.*	Williams *v.* Linnitt	565
Grove *v.* Portal . . .	[1902] 1 Ch. 727	*F.*	Cook *v.* Shoesmith Parkinson *v.* Barclays Bank Ld. .	752 368
Groves, Maclean *v.* Volkart Bros.	C. & E. 309 .	*R.*	Noemijulia Steamship Co. Ld. *v.* Minister of Food	223
Guaranty Trust Co. *v.* United States	304 U. S. 126 .	*C.*	Boguslawski *v.* Gdynia-Ameryka Linie . . .	162
Guaranty Trust Co. of New York *v.* Hannay	[1915] 2 K. B. 536		Howard *v.* Pickford Tool Co. Ld.	417
Guildford Corporation *v.* Brown	[1915] 1 K. B. 256	*R.*	Coleborn (T.) & Sons Ld. *v.* Blond	43
Gulielm's Case . .	Latch 88 . .	*R.*	Williams *v.* Linnitt	565
Gundry *v.* Sainsbury .	[1910] 1 K. B. 645	*R.*	Daley *v.* Diggers Ld. . . .	661
Hadley *v.* Baxendale .	9 Ex. 341 .	*R.*	Biggin & Co. Ld. *v.* Permanite Ld.	422
Hadley *v.* Perks . .	L. R. 1 Q. B. 444	*E.*	Willey *v.* Peace .	94
Haile-Selassie *v.* Cable & Wireless (No. 2)	[1939] Ch. 182	*R.*	Boguslawski *v.* Gdynia-Ameryka Linie . . .	162
Hain Steamship Co. Ld. *v.* Tate & Lyle Ld.	41 Com. Cas. 350		S.S. Ardennes (Cargo Owners) *v.* S.S. Ardennes (Owners) . .	55
Hain Steamship Co. Ld. *v.* Tate & Lyle Ld.	52 T. L. R. 617	*R.*	Chandris *v.* Isbrandtsen-Moller Co. Inc. . .	240
Hales *v.* Bolton Leathers Ld.	[1950] 1 K. B. 493	*R.*	Holloway *v.* Mobberley & Perry Ld. . . .	316
Halley, The . . .	L. R. 2 P. C. 193		Howgate *v.* Bagnall . . .	265
Hamilton-Gell *v.* White .	[1922] 2 K. B. 422		Boddington *v.* Wisson . .	607

Hammond & Co. *v.* Bussey	20 Q. B. D. 79	*R.*	Biggin & Co. Ld. *v.* Permanite Ld.	422
Harland's Case . .	Clayton 97 .	*R.*	Williams *v.* Linnitt	565
Harold *v.* Smith . .	5 H. & N. 381	*R.*	Daley *v.* Diggers Ld. . . .	661
Harris *v.* Harris . .	[1949] 2 All E. R. 318	*R.*	Rex *v.* Sandbach Justices . .	62
Harris *v.* Rotol Ld. . .	[1950] 2 K. B. 573	*E.*	Holloway *v.* Mobberley & Perry Ld. . . .	316
Hartland *v.* Diggines .	[1926] A. C. 289		Jaworski *v.* Institution of Polish Engineers in Great Britain Ld.	768
Haskins *v.* Lewis . .	[1931] 2 K. B. 1	*Appl.*	Brown (John M.) Ld. *v.* Bestwick Regional Properties Co. Ld. *v.* Frankenschwerth and Chapman .	21 631
Hastings (Lord) *v.* Saddler	79 L. T. 355 .	*F.*	Perrott (J. F.) & Co. Ld. *v.* Cohen	705
Hawtrey *v.* Beaufront Ld.	[1946] K. B. 280		Egerton *v.* Rutter	472
Heap *v.* Ind, Coope & Allsopp	[1940] 2 K. B. 476	*Appl.*	Mint *v.* Good .	517
Hedges *v.* Hooker . .	60 L. T. 822 .	*C.*	Duncan *v.* Graham	71
Hewitt *v.* Taylor . .	[1896] 1 Q. B. 287	*Appl.*	Preston *v.* Fennell	16
Heyman *v.* Darwins Ld. .	[1942] A. C. 356	*R.*	Howard *v.* Pickford Tool Co. Ld.	417
Hill *v.* Booth . . .	[1930] 1 K. B. 381	*F.*	Regor Estates Ld. *v.* Wright . .	689
Hill *v.* Fox . . .	4 H. & N. 359	*Appr.*	MacDonald *v.* Green . .	594
Hill *v.* Gregory . .	[1912] 2 K. B. 61		Jaworski *v.* Institution of Polish Engineers in Great Britain Ld.	768
Hirji Mulji *v.* Cheong Yue Steamship Co.	[1926] A. C. 497	*R.*	British Movietonews Ld. *v.* London and District Cinemas Ld. Cory (William) & Son Ld. *v.* London Corporation	190 8
Hobbs *v.* "The People" Publishing Co. Ld.	"The Times", March 30, 1926	*R.*	Cunningham-Howie *v.* F. W. Dimbleby & Sons Ld. .	360
Hodgkinson *v.* Fernie .	3 C. B. (N.S.) 189	*R.*	Rex *v.* Northumberland Compensation Appeal Tribunal . .	711
Hodgson *v.* York Corporation	28 L. T. 836 .	*R.*	Neath Rural D. C. *v.* Williams .	115
Hogge *v.* Burgess . .	3 H. & N. 293	*R.*	Rex *v.* Northumberland Compensation Appeal Tribunal . .	711
Holme *v.* Brunskill . .	3 Q. B. D. 495		Stagg *v.* Brickett .	648
Holmes *v.* Pipers Ld. .	[1914] 1 K. B. 57		Kat *v.* Diment .	34
Horton *v.* London Graving Dock Co.	[1950] 2 K. B. 421	*R.*	Protheroe *v.* Railway Executive .	376
Hubbard *v.* Messenger .	[1938] 1 K. B. 300		Coleborn (T.) & Sons Ld. *v.* Blond	43
Hutchinson *v.* Jauncey .	[1950] 1 K. B. 574	*R.*	Brown (John M.) Ld. *v.* Bestwick	21

Hyams *v.* Stuart-King	[1908] 2 K. B. 696	*R.*	MacDonald *v.* Green	594
Indermaur *v.* Dames	L. R. 1 C. P. 274; 2 C. P. 311	*R.*	Protheroe *v.* Railway Executive	376
Ingall *v.* Moran	[1944] K. B. 160	*R.*	Egerton *v.* Rutter	472
Inland Revenue Commissioners *v.* Raphael	[1935] A. C. 96	*R.*	British Movietonews Ld. *v.* London and District Cinemas Ld.	190
Insall *v.* Nottingham Corporation	[1949] 1 K. B. 261	*R.*	Stagg *v.* Brickett	648
Inverkip S.S. Co. *v.* Bunge & Co.	[1917] 1 K. B. 3; 2 K. B. 193	*F.*	Chandris *v.* Isbrandtsen-Moller Co. Inc.	240
Jackson *v.* Union Marine Insurance Co. Ld.	L. R. 10 C. P. 125	*R.*	British Movietonews Ld. *v.* London and District Cinemas Ld. Chandris *v.* Isbrandtsen-Moller Co. Inc.	190 240
Jane's Settlement, *In re*	[1918] 2 Ch. 54		Jaworski *v.* Institution of Polish Engineers in Great Britain Ld.	768
Jardine, Matheson & Co. *v.* Clyde Shipping Co.	[1910] 1 K. B. 627	*R.*	Noemijulia Steamship Co. Ld. *v.* Minister of Food	223
Jaworski *v.* Institution of Polish Engineers in Great Britain Ld.	[1950] W. N. 262	*Rev.*	Jaworksi *v.* Institution of Polish Engineers in Great Britain Ld.	768
Jennings *v.* Kelly	[1940] A. C. 206	*R.*	Curtis *v.* Maloney	737
Johnson *v.* Edgware, Highgate & London Ry. Co.	35 Beav. 485; 35 L. J. (Ch.) 322		Parkinson *v.* Barclays Bank Ld.	368
Johnson *v.* Youden	[1950] 1 K. B. 544	*Appl.*	Ferguson *v.* Weaving	814
Johnston *v.* Milling	16 Q. B. D. 460		Cory (William) & Son Ld. *v.* London Corporation	8
Jones *v.* Great Central Ry. Co.	[1910] A. C. 4	*C.*	Westminster Airways Ld. *v.* Kuwait Oil Co. Ld.	134
Jones *v.* Lee	106 L. T. 123		Brock *v.* Richards	529
Jones *v.* Monte Video Gas Co.	5 Q. B. D. 536	*R.*	Westminster Airways Ld. *v.* Kuwait Oil Co. Ld.	134
Jones *v.* Murphy	2 J. & S. 323	*R.*	Egerton *v.* Rutter	472
Jones *v.* Tyler	1 Ad. & E. 522	*R.*	Williams *v.* Linnitt	565
Jones *v.* Whitehill	[1950] 2 K. B. 204	*Dist.*	Langdon *v.* Horton	666
Jones and Carter's Arbitration, *In re*	[1912] 2 Ch. 599	*R.*	Rex *v.* Northumberland Compensation Appeal Tribunal	711
Jones Bros. (Holloway) Ld. *v.* Woodhouse	[1923] 2 K. B. 117		Curtis *v.* Maloney	737
Jozwiak *v.* Hierowski	[1948] W. N. 201	*Appl.*	Stagg *v.* Brickett	648
Kasler and Cohen *v.* Slavouski	[1928] 1 K. B. 78	*R.*	Biggin & Co. Ld. *v.* Permanite Ld.	422
Keegan *v.* Dawson	[1931] I. R. 232	*R.*	Howgate *v.* Bagnall	265

Keeves *v.* Dean	[1924] 1 K. B. 685	*C.*	American Economic Laundry Co. Ld. *v.* Little	400
Kendrick's Agreement, *In re*	[1948] Ch. 430	*R.*	Boddington *v.* Wisson	607
Kensington Borough Council *v.* Allen	[1926] 1 K. B. 576	*R.*	Nalder *v.* Ilford Corporation	822
Kent *v.* Elstob	3 East 18	*C.*	Rex *v.* Northumberland Compensation Appeal Tribunal	711
Kenyon *v.* Walker, Stevenson *v.* Kenyon	[1946] 2 All E. R. 595		Shackleton *v.* Greenhalgh	725
Kestell *v.* Langmaid	[1950] 1 K. B. 233	*C.*	Boddington *v.* Wisson	607
Kiddle *v.* Kidston	14 L. R. Ir. 1		Duncan *v.* Graham	68
King, The *v.* Luellin	12 Mod. 445	*R.*	Williams *v.* Linnitt	565
Kingcome, *In re*	[1936] Ch. 566		Jaworski *v.* Institution of Polish Engineers in Great Britain Ld.	768
Knutsford S.S. Co. *v.* Tillmanns & Co.	[1908] A. C. 406	*R.*	Chandris *v.* Isbrandtsen-Moller Co. Inc.	240
Krzus *v.* Crow's Nest Pass Coal Co. Ld.	[1912] A. C. 590		Howgate *v.* Bagnall	265
Lake *v.* Simmons	[1926] 2 K. B. 50; [1927] A. C. 487	*C.*	Pearson *v.* Rose & Young Ld.	275
Lamond *v.* Richard	[1897] 1 Q. B. 541	*R.*	Williams *v.* Linnitt	565
Lancaster and Macnamara, *In re*	[1918] 2 K. B. 472	*C.*	Howkins *v.* Jardine	614
Lane *v.* Cotton	1 Salk. 18	*R.*	Williams *v.* Linnitt	565
Langford Property Co. Ld. *v.* Batten	[1951] A. C. 223	*R.*	Rex *v.* Sidmouth Rent Tribunal	778
Langford Property Co. *v.* Goldrich	[1949] K. B. 511		Rex *v.* Sidmouth Rent Tribunal	778
Lansbury *v.* Riley	[1914] 3 K. B. 229		Rex *v.* London Sessions; *Ex p.* Beaumont	557
Larsen *v.* Sylvester & Co.	[1908] A. C. 295	*R.*	Chandris *v.* Isbrandtsen-Moller Co. Inc.	240
Lazard Bros. & Co. *v.* Midland Bank Ld.	[1933] A. C. 289	*R.*	Boguslawski *v.* Gdynia-Ameryka Linie	162
Leduc & Co. *v.* Ward	20 Q. B. D. 475	*Dist.*	S.S. Ardennes (Cargo Owners) *v.* S.S. Ardennes (Owners)	55
Lee (John) & Son (Grantham) Ld. *v.* Railway Executive	65 T. L. R. 604	*R.*	British Movietonews Ld. *v.* London and District Cinemas Ld.	190
Lemy *v.* Watson	[1915] 3 K. B. 731		Kat *v.* Diment	34
Leslie & Co. *v.* Cumming	[1926] 2 K. B. 417	*Dist.*	Brown (John M.) Ld. *v.* Bestwick	21
L'Estrange *v.* F. Graucob Ld.	[1934] 2 K. B. 394	*Appl.*	Curtis *v.* Chemical Cleaning & Dyeing Co.	805
Levy *v.* Goldhill	[1917] 2 Ch. 297	*C.*	Sellers *v.* London Counties Newspapers	784
Lewis *v.* Denye	[1940] A. C. 921		Burns *v.* Joseph Terry & Sons Ld.	454

Lewis *v.* Hughes	[1916] 1 K. B. 831		Boddington *v.* Wisson	607
Lewisham Borough Council *v.* Roberts	[1949] 2 K. B. 608		Rex *v.* Minister of Town and Country Planning	1
Linaker *v.* Pilcher	84 L. T. 421	*N.F.*	Longdon - Griffiths *v.* Smith	295
Lindop *v.* Quaife	[1949] W. N. 77		Rex *v.* Sidmouth Rent Tribunal	778
Linnett *v.* Commissioners of Metropolitan Police	[1946] K. B. 290	*R.* *Dist.*	Barker *v.* Levinson Ferguson *v.* Weaving	342 814
Lissenden *v.* C. A. V. Bosch Ld.	[1940] A. C. 412	*R.*	Perrott (J. F.) & Co. Ld. *v.* Cohen	705
Littlechild *v.* Holt	[1950] 1 K. B. 1		American Economic Laundry Co. Ld. *v.* Little	400
Lloyds Bank Ld. *v.* Bank of America National Trust and Savings Association	[1937] 2 K. B. 631		Pearson *v.* Rose & Young Ld.	275
London & Globe Finance Corporation, *In re*	[1903] 1 Ch. 728	*R.*	Kat *v.* Diment	34
London & N.E. Ry. Co. *v.* Berriman	[1946] A. C. 278	*R.* *R.*	Burns *v.* Joseph Terry & Sons Ld. Beadsley *v.* United Steel Companies Ld.	454 408
London Traders' Shipping Co. *v.* General Mercantile Shipping Co.	30 T. L. R. 493		Noemijulia Steamship Co. Ld. *v.* Minister of Food	223
Lorentzen *v.* Lydden	[1942] 2 K. B. 202	*R.*	Boguslawski *v.* Gdynia-Ameryka Linie	162
Lotinga *v.* North Eastern Marine Engineering Co. (1938) Ld.	[1941] 2 K. B. 399	*R.*	Clifford *v.* Charles H. Challen & Son Ld. Burns *v.* Joseph Terry & Sons Ld.	495 454
Low *v.* Bouverie	[1891] 3 Ch. 82	*Appl.*	Curtis *v.* Chemical Cleaning & Dyeing Co.	805
Lowther *v.* Harris	[1927] 1 K. B. 393		Pearson *v.* Rose & Young Ld.	275
Lyderhorn S.S. Co. *v.* Duncan Fox & Co.	[1909] 2 K. B. 929		Noemijulia Steamship Co. Ld. *v.* Minister of Food	223
Lyon *v.* Don Bros., Buist & Co. Ld.	1944 S. C. (J.) 1	*C.*	Burns *v.* Joseph Terry & Sons Ld.	454
Lyon *v.* Reed	13 M. & W. 285		Foster *v.* Robinson	149
Lyttleton, *In re*	[1945] W. N. 24		Whitehouse, *In re*	673
McCarrick *v.* Liverpool Corporation	[1947] A. C. 219	*Dist.*	Mint *v.* Good	517
MacIver *v.* Robertson	High Court of Justiciary, 1950	*N.F.*	Newman *v.* Lipman	333
McKenna *v.* City Life Assurance Co. Ld.	[1919] 2 K. B. 191	*R.*	Midland Counties Motor Finance Co. Ld. *v.* Slade	346
M'Lean *v.* M'Lean	1947 S. C. 79	*R.*	Rex *v.* Sandbach Justices	62

Maclenan *v.* Segar	[1917] 2 K. B. 325	*R.*	Protheroe *v.* Railway Executive	376
Maclennan, *In re*	[1939 Ch. 750		Jaworski *v.* Institution of Polish Engineers in Great Britain Ld.	768
Macmillan & Co. Ld. *v.* Rees	62 T. L. R. 331	*R.*	Stagg *v.* Brickett	648
Magnhild S.S. (Owners) *v.* McIntyre Bros. & Co.	[1920] 3 K. B. 321	*R.*	Chandris *v.* Isbrandtsen-Moller Co. Inc.	240
Margate Pier Proprietors *v.* Margate Corporation	20 L. T. 564	*R.*	Neath Rural D. C. *v.* Williams	115
Marshall *v.* Glanville	[1917] 2 K. B. 87	*Dist.*	Sellers *v.* London Counties Newspapers	784
Mason *v.* Keeling	1 Ld. Raym. 606	*R.*	Brock *v.* Richards	529
Mellor *v.* Lydiate	[1914] 3 K. B. 1141		Ferguson *v.* Weaving	814
Mercer *v.* Pyramid Sand & Gravel Co.	109 J. P. 54	*R.*	Kat *v.* Diment	34
Metcalfe *v.* Boyce	[1927] 1 K. B. 758	*Appl.*	Foster *v.* Robinson	149
Metropolitan Water Board *v.* Dick, Kerr & Co. Ld.	[1918] A. C. 119	*R.*	British Movietonews Ld. *v.* London and District Cinemas Ld. Chandris *v.* Isbrandtsen-Moller Co. Inc.	190 240
Miller *v.* William Boothman & Sons Ld.	[1944] K. B. 337	*R.*	Burns *v.* Joseph Terry & Sons Ld.	454
Mills *v.* Goff	14 M. & W. 72	*Appl.*	Chez Auguste Ld. *v.* Cottat	292
Minister of Pensions *v.* Chennell	[1947] K. B. 250	*C.*	Howgate *v.* Bagnall	265
Mittelmann *v.* Denman	[1920] 1 K. B. 519	*R.*	Rex *v.* London Quarter Sessions; *Ex parte* Bowes	383
Moody *v.* Pall Mall Deposit and Forwarding Co. Ld.	33 T. L. R. 306		Pearson *v.* Rose & Young Ld.	275
Moorcock, The	14 P. D. 64	*R.*	British Movietonews Ld. *v.* London and District Cinemas Ld. Noemijulia Steamship Co. Ld. *v.* Minister of Food	190 223
Morris *v.* Hunt & Co.	12 T. L. R. 187		Sellers *v.* London County Newspapers	784
Moseley *v.* Director of Public Prosecutions	[1920] 1 K. B. 16		Rex *v.* London Quarter Sessions; *Ex parte* Bowes	383
Mosley *v.* Fossett	1 Roll. Ab. 4 (5)	*R.*	Williams *v.* Linnitt	565
Moss Steamship Co. *v.* Whinney	[1912] A. C. 254		S.S. Ardennes (Cargo Owners) *v.* S.S. Ardennes (Owners)	55
Moss, *In re, ex parte* Hallett	[1905] 2 K. B. 307		Midland Counties Motor Finance Co. Ld. *v.* Slade	346

Mountain *v.* Bermondsey Borough Council	[1942] 2 K. B. 204		O'Meara *v.* South-Eastern Gas Board . .	307
Moussel Brothers Ld. *v.* London & North Western Ry. Co.	[1917] 2 K. B. 836		Ferguson *v.* Weaving . . .	814
Naamlooze, etc., Vulcaan A/S Ludwig Mowinckels Rederi	43 Com. Cas. 252; [1938] 2 All E. R. 152	*R.*	Chandris *v.* Isbrandtsen-Moller Co. Inc. . .	240
Nash *v.* High Duty Alloys Ld.	[1947] K. B. 377	*R.*	Burns *v.* Joseph Terry & Sons Ld.	454
Nayler *v.* Yearsley . .	2 F. & F. 41 .	*R.*	Sellers *v.* London Counties Newspapers .	784
Neale *v.* Del Soti . .	[1945] K. B. 144	*R.*	Shackleton *v.* Greenhalgh .	725
Nelson Line Ld. *v.* Nelson	[1908] A. C. 16		S.S. Ardennes (Cargo Owners) *v.* S.S. Ardennes (Owners) . .	55
Nicholson *v.* Willan . .	5 East 507 .	*R.*	Williams *v.* Linnitt	565
Noble *v.* Southern Ry. Co.	[1940] A. C. 583	*R.*	Rex *v.* Northumberland Compensation Appeal Tribunal .	711
Norbury, *In re* . . .	[1939] Ch. 528		Jaworski *v.* Institution of Polish Engineers in Great Britain Ld. . . .	768
North British Ry. Co. *v.* Scott	[1923] A. C. 37	*R.*	Jaworski *v.* Institution of Polish Engineers in Great Britain Ld. . . .	768
Northumbrian Shipping Co. Ld. *v.* E. Timm & Son Ld.	[1939] A. C. 397		Noemijulia Steamship Co. Ld. *v.* Minister of Food	223
Nugent *v.* Vetzera . .	L. R. 2 Eq. 704		Rex *v.* Sandbach Justices . .	62
Oastler *v.* Henderson .	2 Q. B. D. 575	*R.*	Foster *v.* Robinson	149
Olley *v.* Marlborough Court	[1949] 1 K. B. 532	*Appl.*	Curtis *v.* Chemical Cleaning & Dyeing Co. . . .	805
Oppenheimer *v.* Frazer & Wyatt	[1907] 2 K. B. 50	*C.*	Pearson *v.* Rose & Young Ld. .	275
Orchard *v.* Bush & Co. .	[1898] 2 Q. B. 284	*Appl.*	Williams *v.* Linnitt	565
O'Shea, *In re, ex parte* Lancaster	[1911] 2 K. B. 981	*R.*	MacDonald *v.* Green . .	594
Palser *v.* Grinling . .	[1948] A. C. 291		Stagg *v.* Brickett .	648
Parana, The . . .	2 P. D. 118 .	*Dist.*	S.S. Ardennes (Cargo Owners) *v.* S.S. Ardennes (Owners) . .	55
Park *v.* Wilson and Clyde Coal Co. Ld.	1938 S. C. 121 .	*R.*	Gould *v.* Minister of National Insurance . .	731
Parkinson (Sir Lindsay) & Co. Ld. *v.* Commissioners of Works and Public Buildings	[1949] 2 K. B. 632	*F.*	British Movietonews Ld. *v* London and District Cinemas Ld.	190
Peek *v.* North Staffordshire Ry. Co.	10 H. L. C. 493	*R.*	Williams *v.* Linnitt	565
Peter *v.* Kendal . .	6 B. & C. 703 .		Foster *v.* Robinson	149

Pettit, *In re*	[1922] 2 Ch. 765	*R.*	Jaworski *v.* Institution of Polish Engineers in Great Britain Ld.	768
Philips *v.* Bury	4 Mod. 106	*C.*	Rex *v.* Dunsheath	127
Phillips *v.* Copping	[1935] 1 K. B. 15	*F.*	Mills *v.* Bryce	757
Phillips *v.* Eyre	L. R. 6 Q. B. 1		Howgate *v.* Bagnall	265
Pidgeon *v.* Legge	21 J. P. 743	*R.*	Williams *v.* Linnitt	565
Pilling *v.* Abergele Urban District Council	[1950] 1 K. B. 636	*F.*	Higham *v.* Havant and Waterloo Urban District Council	509
Plymouth Mutual Co-operative and Industrial Society *v.* Traders' Publishing Association Ld.	[1906] 1 K. B. 403		Adams *v.* Sunday Pictorial Newspapers (1920) Ld. and Champion	354
Podar Trading Co. Ld., Bombay *v.* Francois Tagher, Barcelona	[1949] 2 K. B. 277	*O. on one point.*	Chandris *v.* Isbrandtsen-Moller Co. Inc.	240
Point of Ayr Collieries Ld. *v.* Lloyd-George	[1943] 2 All E. R. 546	*R.*	Earl Fitzwilliam's Wentworth Estates Co. *v.* Minister of Town and Country Planning	203
Police Commissioners *v.* Cartman	[1896] 1 Q. B. 655		Ferguson *v.* Weaving	814
Pollard *v.* Turner	[1912] 3 K. B. 625		Corkery *v.* Carpenter	102
Pontardawe Rural D. C. *v.* Moore-Gwyn	[1929] 1 Ch. 656	*Appl.*	Neath Rural D. C. *v.* Williams	115
Pratt *v.* British Medical Association	[1919] 1 K. B. 244	*R.*	Longdon-Griffiths *v.* Smith	295
Pretty *v.* Bickmore	L. R. 8 C. P. 401	*R.*	Mint *v.* Good	517
Price *v.* Gould	143 L. T. 333		Langdon *v.* Horton	666
Prout *v.* Hunter	[1924] 2 K. B. 736	*Dist.*	Brown (John M.) Ld. *v.* Bestwick	21
		R.	Stagg *v.* Brickett	648
Pyke, *Ex parte, in re* Lister	8 Ch. D. 754	*O.*	MacDonald *v.* Green	594
Racecourse Betting Control Board *v.* Secretary for Air	[1944] Ch. 114	*N. F.*	Rex *v.* Northumberland Compensation Appeal Tribunal	711
Ram Dutt Ramkissendass *v.* E. D. Sassoon & Co.	[1929] W. N. 27; 98 L. J. (P. C.) 58	*Appl.*	Chandris *v.* Isbrandtsen-Moller Co. Inc.	240
Rayner *v.* Stepney Corporation	[1911] 2 Ch. 312	*R.*	Nalder *v.* Ilford Corporation	822
Reed (Dennis) Ld. *v.* Goody	[1950] 2 K. B. 277	*R.*	British Movietonews Ld. *v.* London and District Cinemas Ld.	190
Rees *v.* Perrot	4 C. & P. 230	*F.*	Egerton *v.* Rutter	472
Reg. *v.* Blane	13 Q. B. 769	*F.*	O'Dea *v.* Tetau	184
Reg. *v.* Bolton	5 Mod. 416	*R.*	Rex *v.* Northumberland Compensation Appeal Tribunal	711
Reg. *v.* Burgess	Leigh & Ca. 299		Curtis *v.* Chemical Cleaning & Dyeing Co.	805

Reg. *v.* Castro	5 Q. B. D. 490	*R.*	Rex *v.* Morris	394
Reg. *v.* Commissioners for Special Purposes of Income Tax Acts	21 Q. B. D. 313	*R.*	Rex *v.* London, etc., Rent Tribunal	641
Reg. *v.* Cotham	[1898] 1 Q. B. 802		Rex *v.* Northumberland Compensation Appeal Tribunal	711
Reg. *v.* Dublin Justices	15 Cox C. C. 379	*R.*	Duncan *v.* Graham	71
Reg. *v.* Fisher	39 J. P. 612	*F.*	Willey *v.* Peace	94
Reg. *v.* Hertford College, Oxford	3 Q. B. D. 693	*Appl.*	Rex *v.* Dunsheath	127
Reg. *v.* London Justices	[1900] 1 Q. B. 438		Rex *v.* London Quarter Sessions; *Ex parte* Bowes	383
Reg. *v.* Parker	59 J. P. 793		Corkery *v.* Carpenter	102
Reg. *v.* Rymer	2 Q. B. D. 136	*C.*	Williams *v.* Linnitt	565
Reg. *v.* Warwickshire Justices	6 E. & B. 837	*Appl.*	Rex *v.* London Quarter Sessions; *Ex parte* Bowes	383
Reg. *v.* Webster	Leigh & Ca. 77		Curtis *v.* Chemical Cleaning & Dyeing Co.	805
Regional Properties Co. Ld. *v.* Oxley	[1945] A. C. 347		R.M.R. Housing Society Ld. *v.* Combs	486
Reid *v.* Langlois	1 Mac. & G. 627	*R.*	Westminster Airways Ld. *v.* Kuwait Oil Co. Ld.	134
Reilley *v.* William Beardmore & Co. Ld.	1947 S. C. 275	*R.*	Beadsley *v.* United Steel Companies Ld.	408
Remon *v.* City of London Real Property Co. Ld.	[1921] 1 K. B. 49	*Dist.*	Brown (John M.) Ld. *v.* Bestwick	21
		R.	R.M.R. Housing Society Ld. *v.* Combs	486
Rex *v.* Barnet, etc., Rent Tribunal	48 L. G. R. 549		Rex *v.* London Rent Tribunal	641
Rex *v.* Beamon	32 Cr. App. R. 181		Rex *v.* Albury	680
Rex *v.* Bennett and Newton	9 Cr. App. R. 146	*R.*	Kat *v.* Diment	34
Rex *v.* Bramley	Russ. & R. 478		Rose *v.* Matt	811
Rex *v.* Chadwick	24 Cr. App. R. 138		Rex *v.* Murray	391
Rex *v.* Clarke	[1950] 1 K. B. 523		Rex *v.* Harris	107
Rex *v.* Cohen & Bateman	2 Cr. App. R. 197	*R.*	Rex *v.* Murray	391
Rex *v.* Cowell	[1940] 2 K. B. 49		Rex *v.* Murray	391
Rex *v.* Fairbairn	[1949] 2 K. B. 690		Rex *v.* Harris	107
Rex *v.* Faithful	66 (Pt. 2) T. L. R. 1044		Whitehouse, *In re*	673
Rex *v.* Fitzpatrick	[1948] 2 K. B. 203	*R.*	Rex *v.* Cohen	505
Rex *v.* Fox	21 Ll. L. R. 72	*Dist.*	Duncan *v.* Graham	68
Rex *v.* Fulham, etc., Rent Tribunal	[1950] 2 K. B. 506	*R.*	Rex *v.* London, etc., Rent Tribunal	641
Rex *v.* Garth	[1949] W. N. 170		Rex *v.* Cohen	505
Rex *v.* Governor of Brixton Prison, *Ex parte* Stallman	[1912] 3 K. B. 424		Rex *v.* Grant	500

Rex *v.* Graham-Campbell .	[1935] 1 K. B. 594		Rex *v.* London Quarter Sessions; *Ex parte* Bowes	383
Rex *v.* Grant . . .	26 Cr. App. R. 8	*R.*	Rex *v.* Grant .	500
Rex *v.* Greenhoe Justices .	66 (Pt. 2) T. L. R. 452		Whitehouse, *In re*	673
Rex *v.* Hackney, Islington, etc., Rent Tribunal	[1950] 2 All E. R. 138		Rex *v.* London, etc., Rent Tribunal . .	641
Rex *v.* Hampstead and St. Pancras Rent Tribunal	[1947] K. B. 973	*R.*	Rex *v.* London, etc., Rent Tribunal . .	641
Rex *v.* Higgins . .	[1948] 1 K. B. 165	*R.*	Williams *v.* Linnitt	565
Rex *v.* Humphrys . .	[1914] 3 K. B. 1237	*E.*	O'Dea *v.* Tetau .	184
Rex *v.* Jacobs . . .	[1944] K. B. 147		Winkle *v.* Wiltshire . . .	684
Rex *v.* Johnson . .	7 Cr. App. R. 19		Rex *v.* Albury .	680
Rex *v.* Jones . . .	[1929] 1 K. B. 211		Rex *v.* Parry .	590
Rex *v.* Kakelo . . .	[1923] 2 K. B. 795	*R.*	Rex *v.* Cohen .	505
Rex *v.* Kylsant (Lord) .	[1932] 1 K. B. 442	*Appl.*	Curtis *v.* Chemical Cleaning & Dyeing Co. . .	805
Rex *v.* Licensing Authority for Goods Vehicles for the Metroplitan Area	[1949] 2 K. B. 17		Rex *v.* Northumberland Compensation Appeal Tribunal . .	711
Rex *v.* Lincolnshire Justices	[1926] 2 K. B. 192	*R.*	Rex *v.* London Rent Tribunal .	641
Rex *v.* London Sessions; *Ex parte* Metropolitan Police Commissioners	[1948] 1 K. B. 670	*R.*	Rex *v.* London Sessions; *Ex p.* Beaumont . .	557
Rex *v.* Luellin . .	12 Mod. 445 .	*R.*	Williams *v.* Linnitt	565
Rex *v.* Minister of Health	[1939] 1 K. B. 232		Rex *v.* Northumberland Compensation Appeal Tribunal . .	711
Rex *v.* Minister of Town and Country Planning	66 T. L. R. (Pt. 1) 141	*Aff.*	Rex *v.* Minister of Town and Country Planning . . .	1
Rex *v.* Monmouthshire Justices	109 L. T. 788 .		Rex *v.* Northumberland Compensation Appeal Tribunal . .	711
Rex *v.* Morris . . .	42 T. L. R. 373	*R.*	Rex *v.* Morris .	394
Rex *v.* Nat Bell Liquors Ld.	[1922] 2 A. C. 128	*Appl.*	Rex *v.* Northumberland Compensation Appeal Tribunal . .	711
Rex *v.* O'Neill . .	33 Cr. App. R. 10		Rex *v.* Albury .	680
Rex *v.* Paddington and St. Marylebone Rent Tribunal	[1949] 1 K. B. 666		Rex *v.* Northumberland Compensation Appeal Tribunal . .	711
Rex *v.* Paddington and St. Marylebone Rent Tribunal	[1948] 2 K. B. 413		Mills *v.* Bryce .	757
Rex *v.* Paddington and St. Marylebone Furnished Houses Rent Tribunal	63 T. L. R. 239		Rex *v.* Northumberland Compensation Appeal Tribunal . .	711

Rex *v.* Port of London Authority	[1919] 1 K. B. 176		Rex *v.* Northumberland Compensation Appeal Tribunal	711
Rex *v.* Recorder of Leicester	[1946] 1 All E. R. 615		Rex *v.* London Quarter Sessions; *Ex parte* Bowes	383
Rex *v.* Sandbach, *Ex p.* Williams	[1935] 2 K. B. 192		Rex *v.* London Sessions; *Ex p.* Beaumont	557
Rex *v.* Sheridan	[1937] 1 K. B. 223	*R.*	Rex *v.* Grant	500
Rex *v.* Trueman	[1913] 3 K. B. 164		Rex *v.* London Sessions; *Ex p.* Beaumont	557
Rex *v.* Westminster Assessment Committee	[1940] 3 All E. R. 155		Rex *v.* Northumberland Compensation Appeal Tribunal	711
Rex *v.* Westminster Assessment Committee. St. James' Court Estate, *Ex p.*	85 S. J. 46		Rex *v.* Northumberland Compensation Appeal Tribunal	711
Rex *v.* Wilkes	19 St. Tr. 1075	*Appl.*	Rex *v.* Albury	680
Rex *v.* Wilkinson	Russ. & Ry. 470	*R.*	Curtis *v.* Chemical Cleaning & Dyeing Co.	805
Riceslip Parish *v.* Henden Parish	5 Mod. 416	*C.*	Rex *v.* Northumberland Compensation Appeal Tribunal	711
Rickards (Charles) Ld. *v.* Oppenheim	[1950] 1 K. B. 616	*R.*	Perrott (J. F.) & Co. Ld. *v.* Cohen	705
River Thames Conservators *v.* Port of London Authority	[1894] 1 Q. B. 647	*R.*	Neath Rural D. C. *v.* Williams	115
Roberts *v.* Jones	[1947] K. B. 221	*R.*	Stagg *v.* Brickett	648
Robins *v.* Gray	[1895] 2 Q. B. 501		Williams *v.* Linnitt	565
Roe *v.* Russell	[1928] 2 K. B. 117	*R.*	Regional Properties Co. Ld. *v.* Frankenschwerth and Chapman	631
Rubie *v.* Faulkner	[1940] 1 K. B. 571		Ferguson *v.* Weaving	814
Rush *v.* Baker	Bull. N. P. 41		Curtis *v.* Maloney	737
Rush *v.* Matthews	[1926] 1 K. B. 75, 492	*R.*	Regor Estates Ld. *v.* Wright	689
Russell *v.* Beecham	[1924] 1 K. B. 525	*R.*	Cook *v.* Shoesmith	752
Russell *v.* Coggins	8 Ves. 34		Parkinson *v.* Barclays Bank	368
Russell and Harding's Arbitration, *In re*	128 L. T. 476	*R.*	Howkins *v.* Jardine	614
Rylands *v.* Fletcher	L. R. 3 H. L. 330	*R.*	Neath Rural D. C. *v.* Williams	115
Saffery *v.* Mayer	[1901] 1 K. B. 11	*R.*	MacDonald *v.* Green	594
St. John's College, Cambridge *v.* Todington	1 Burr. 158	*C.*	Rex *v.* Dunsheath	127
Samuel *v.* Salmon and Gluckstein Ld.	[1946] Ch. 8	*R.*	Regor Estates Ld. *v.* Wright	689
Sanders *v.* Spencer	3 Dyer 266 (b)	*Appl.*	Williams *v.* Linnitt	565

Saunders, *In re*	[1898] 1 Ch. 17		Jaworski *v.* Institution of Polish Engineers in Great Britain Ld.	768
Schloss Bros. *v.* Stevens	[1906] 2 K. B. 665	*R.*	Chandris *v.* Isbrandtsen-Moller Co. Inc.	240
School for Indigent Blind at Liverpool, *In re*	[1898] 2 Ch. 669		Jaworski *v.* Institution of Polish Engineers in Great Britain Ld.	768
Schwartz *v.* India Rubber Gutta Percha and Telegraph Works Co. Ld.	[1912] 2 K. B. 299	*R.*	Howgate *v.* Bagnall	265
Scott *v.* Pattison	[1923] 2 K. B. 723	*R.*	James *v.* Thomas H. Kent & Co. Ld.	551
Seabrook *v.* Mervyn	[1947] 1 All E. R. 295	*Dist.*	Stagg *v.* Brickett	648
Searle *v.* Wallbank	[1947] A. C. 341	*F.*	Brock *v.* Richards	529
Sedleigh-Denfield *v.* O'Callaghan	[1940] A. C. 880	*Dist.* *Dist.*	Neath Rural D. C. *v.* Williams Mint *v.* Good	115 517
Sewell *v.* Burdick	10 App Cas. 74	*R.*	S.S. Ardennes (Cargo Owners) *v.* S.S. Ardennes (Owners)	55
Shaw *v.* Smith	18 Q. B. D. 193		Clayson *v.* Rolls Royce Ld. and Evans Lifts Ld.	746
Sheffield Corporation *v.* Luxford	[1929] 2 K. B. 180	*Dist.*	Yates *v.* Morris	77
Sherras *v.* De Rutzen	[1895] 1 Q. B. 918		Ferguson *v.* Weaving	814
Shirlaw *v.* Southern Foundries	[1939] 2 K. B. 206	*R.*	British Movietonews Ld. *v.* London and District Cinemas Ld.	190
Short *v.* J. & W. Henderson, Ld.	39 B. W. C. C. 62	*R.*	Gould *v.* Minister of National Insurance	731
Signy *v.* Abbey National Building Society	[1944] K. B. 449	*R.*	Stagg *v.* Brickett	648
Simpson *v.* Teignmouth & Shaldon Bridge Co.	[1903] 1 K. B. 405	*Dist.*	Corkery *v.* Carpenter	102
Skinner *v.* Geary	[1931] 2 K. B. 546	*R.* *R.*	Brown (John M.) Ld. *v.* Bestwick Regional Properties Co. Ld. *v.* Frankenschwerth and Chapman	21 631
Smith, *In re*	3 H. & N. 227	*R.*	Ferguson *v.* Weaving	814
Smith *v.* Baker	[1891] A. C. 325	*R.*	Davies *v.* De Havilland Aircraft Co. Ld.	50
Smith *v.* Cook	1 Q. B. D. 79	*R.*	Brock *v.* Richards	529
Smith *v.* Kynnersley	[1903] 1 K. B. 788		Corkery *v.* Carpenter	102
Smith *v.* Mather	[1948] 2 K. B. 212	*R.*	Egerton *v.* Rutter	472
Smith *v.* National Meter Co. Ld.	[1945] K. B. 543	*R.*	Longdon - Griffiths *v.* Smith	295
Smith *v.* Streatfeild	[1913] 3 K. B. 764	*Q. and Dist.*	Longdon - Griffiths *v.* Smith	295

Smithwick *v.* National Coal Board	[1950] 2 K. B. 335	*Appl.*	Burns *v.* Joseph Terry & Sons Ld.	454
Snelling *v.* Lord Huntington	1 C. M. & R. 20	*R.*	James *v.* Thomas H. Kent & Co. Ld. . . .	551
Société Maritime et Commerciale *v.* Venus Steam Shipping Co. Ld.	9 Com. Cas. 289	*C.*	Howard *v.* Pickford Tool Co. Ld.	417
Somerset *v.* Hart . .	12 Q. B. D. 360	*R.*	Ferguson *v.* Weaving . . .	814
Somerset *v.* Wade . .	[1894] 1 Q. B. 574	*R.*	Ferguson *v.* Weaving . . .	814
South American Stores (Gath & Chaves) Ld. *v.* Inland Revenue Commissioners	12 Tax Cas. 905	*R.*	Jaworski *v.* Institution of Polish Engineers in Great Britain Ld. . . .	768
Southend-on-Sea Estates Co. Ld. *v.* Inland Revenue Commissioners	[1914] 1 K. B. 515	*R.*	Parkinson *v.* Barclays Bank Ld. .	368
Southwark and Vauxhall Water Co. *v.* Quick	3 Q. B. D. 315		Westminster Airways Ld. *v.* Kuwait Oil Co. Ld.	134
Sowter *v.* Steel Barrel Co. Ld.	154 L. T. 85 .	*C.*	Burns *v.* Joseph Terry & Sons Ld. . . .	454
Spettabile Consorzio Veneziano di Armamento e Navigazione *v.* Northumberland Shipbuilding Co. Ld.	121 L. T. 628 .	*C.*	Howard *v.* Pickford Tool Co. Ld.	417
Staffs. Motor Guarantee Ld. *v.* British Wagon Co.	[1934] 2 K. B. 305	*R.*	Pearson *v.* Rose & Young Ld. .	275
Standingford *v.* Probert .	[1950] 1 K. B. 377		Langdon *v.* Horton	666
Stanley *v.* Thomas . .	[1939] 2 K. B. 462	*Dist.*	Holt *v.* Dyson .	364
Star Cinema (Shepherds Bush) Ld. *v.* Baker	86 J. P. 47 .		Barker *v.* Levinson . . .	342
Starey *v.* Chilworth Gunpowder Co.	24 Q. B. D. 90	*C.*	Kat *v.* Diment .	34
Stephens *v.* Watson . .	1 Salk. 45 .	*R.*	Williams *v.* Linnitt	565
Steven (E. T.) & Co. *v.* Bromley (Adam) & Son	[1919] 2 K. B. 722	*R.*	Chandris *v.* Isbrandtsen-Moller Co. Inc. . .	240
Stocker *v.* Planet Building Society	27 W. R. 877 .	*R.*	Mint *v.* Good .	517
Stone *v.* Burn . . .	[1911] 1 K. B. 927	*R.*	Kat *v.* Diment .	34
Sueton D. Grant & Co. *v.* Coverdale, Todd & Co.	9 App. Cas. 470	*R.*	Chandris *v.* Isbrandtsen-Moller Co. Inc. . .	240
Sun Shipping Co. Ld. *v.* Watson and Youell Shipping Agency	42 T. L. R. 240	*R.*	Noemijulia Steamship Co. Ld. *v.* Minister of Food	223
Swanson *v.* Forton . .	[1949] Ch. 143		Regional Properties Co. Ld. *v.* Frankenschwerth and Chapman .	631
Sweeny *v.* Sweeny . .	I. R. 10 C. L. 375	*F.*	Egerton *v.* Rutter	472
Sydney Municipal Council *v.* Campbell	[1925] A. C. 338	*R.*	Earl Fitzwilliam's Wentworth Estates Co. *v.* Minister of Town and Country Planning . . .	203

Tabor *v.* Godfrey	64 L. J. (Q. B.) 245	*F.*	Perrott (J. F.) & Co. Ld. *v.* Cohen	705
Taff Vale Ry. Co. *v.* Amalgamated Society of Railway Servants	[1901] A. C. 426	*Appl.*	Longdon - Griffiths *v.* Smith	295
Tarry *v.* Ashton	1 Q. B. D. 314	*R.*	Mint *v.* Good	517
Tatam *v.* Reeve	[1893] 1 Q. B. 44	*F.*	MacDonald *v.* Green	594
Tatham, *In re*	[1945] Ch. 34		Jaworski *v.* Institution of Polish Engineers in Great Britain Ld.	768
Taylor *v.* Goodwin	4 Q. B. D. 228	*Appl.*	Corkery *v.* Carpenter	102
Thames & Mersey Marine Insce. Co. Ld. *v.* Hamilton, Fraser & Co.	12 App. Cas. 484	*R.*	Chandris *v.* Isbrandtsen-Moller Co. Inc.	240
Thomas *v.* Bradbury, Agnew & Co. Ld.	[1906] 2 K. B. 627	*Dist.*	Longdon - Griffiths *v.* Smith	295
Thomas *v.* Lindop	[1950] W. N. 227		Ferguson *v.* Weaving	814
Thompson *v.* Lacy	3 B. & Ald. 283	*C.*	Williams *v.* Linnitt	565
Thompson *v.* Rolls	[1926] 2 K. B. 426		Parkinson *v.* Barclays Bank Ld.	368
Thomson *v.* University of London	10 Jur. (N.S.) 669	*C.*	Rex *v.* Dunsheath	127
Thorman *v.* Dowgate S.S. Co. Ld.	[1910] 1 K. B. 410	*R.*	Chandris *v.* Isbrandtsen-Moller Co. Inc.	240
Tickner *v.* Clifton	[1929] 1 K. B. 207		American Economic Laundry Co. Ld. *v.* Little	400
Tillmanns & Co. *v.* Steamship Knutsford Ld.	[1910] 2 K. B. 385	*R.*	Chandris *v.* Isbrandtsen-Moller Co. Inc.	240
Tomalin *v.* S. Pearson & Son	[1909] 2 K. B. 61	*R.*	Howgate *v.* Bagnall	265
Tritton *v.* Bankart	56 L. J. (Ch.) 629		Clayson *v.* Rolls Royce Ld. and Evans Lifts Ld.	746
Truman, Hanbury, Buxton & Co. *v.* Kerslake	[1894] 2 Q. B. 774	*R.*	Nalder *v.* Ilford Corporation	822
Tuck & Sons *v.* Priester	19 Q. B. D. 629	*R.*	Beadsley *v.* United Steel Companies Ld. Burns *v.* Joseph Terry & Sons Ld.	408 454
Tudor - Hart *v.* British Union for the Abolition of Vivisection	[1938] 2 K. B. 329	*R.*	Cunningham-Howie *v.* F. W. Dimbleby & Sons Ld.	360
Turner *v.* Baker	[1949] 1 K. B. 605; [1950] A. C. 401	*R.*	Shackleton *v.* Greenhalgh	725
Turner *v.* Coates	[1917] 1 K. B. 670		Brock *v.* Richards	529
Turner *v.* Sampson	27 T. L. R. 200		Pearson *v.* Rose & Young Ld.	275
Turner *v.* Watts	44 T. L. R. 337	*R.*	Foster *v.* Robinson	149
Van der Poorten *v.* Settlement Officer	[1946] A. C. 271		Rex *v.* Grant	500
Vaughan *v.* Campbell Heatley & Co.	2 T. L. R. 33	*R.*	Noemijulia Steamship Co. Ld. *v.* Minister of Food	223
Victoria Laundry (Windsor) Ld. *v.* Newman Industries	[1949] 2 K. B. 528	*R.*	Biggin & Co. Ld. *v.* Permanite Ld.	422

Vortigern, The	[1899] P. 140	*R.*	Noemijulia Steamship Co. Ld. *v.* Minister of Food	223
Vowles *v.* Armstrong-Siddeley Motors Ld.	55 T. L. R. 201	*C.*	Burns *v.* Joseph Terry & Sons Ld.	454
Vyner *v.* Waldenberg Bros. Ld.	[1946] K. B. 50		Clifford *v.* Charles H. Challen & Son Ld.	495
Wade *v.* Beadle	64 T. L. R. 498	*Dist.*	Preston *v.* Fennell	16
Wagstaff *v.* Shorthorn Dairy	C. & E. 324	*R.*	Biggin & Co. Ld. *v.* Permanite Ld.	422
Walker *v.* Bletchley Flettons Ld.	[1937] 1 All E. R. 170	*Appl.*	Burns *v.* Joseph Terry & Sons Ld.	454
Waller *v.* Thomas	[1921] 1 K. B. 541		Foster *v.* Robinson	149
Wallis *v.* Hands	[1893] 2 Ch. 75	*R.*	Foster *v.* Robinson	149
Wallis, Son & Wells *v.* Pratt & Haynes	[1910] 2 K. B. 1003; [1911] A. C. 394	*R.*	Chandris *v.* Isbrandtsen-Moller Co. Inc.	240
Walsall Overseers *v.* London and North Western Ry. Co.	4 App. Cas. 30	*Appl.*	Rex *v.* Northumberland Compensation Appeal Tribunal	711
Walter *v.* Eton Rural D. C.	[1950] 2 K. B. 583	*Aff.*	Walter *v.* Eton Rural D. C.	84
Warbrook *v.* Griffin	2 Br. & G. 254	*R.*	Williams *v.* Linnitt	565
Watson *v.* Winch	[1916] 1 K. B. 688		British Movietonews Ld. *v.* London and District Cinemas Ld.	190
Welch *v.* Nagy	[1950] 1 K. B. 455, 461	*C.*	Stagg *v.* Brickett	648
Whitby *v.* Burt, Boulton & Hayward Ld.	[1947] K. B. 540		Clayson *v.* Rolls Royce Ld. and Evans Lifts Ld.	746
Whitehorn Bros. *v.* Davidson	[1911] 1 K. B. 463		Pearson *v.* Rose & Young Ld.	275
Whiteside *v.* Whiteside	[1950] Ch. 65	*R.*	Jaworski *v.* Institution of Polish Engineers in Great Britain Ld.	768
Whitmore *v.* Greene	13 M. & W. 104		Curtis *v.* Maloney	737
Wicks *v.* Director of Public Prosecutions	[1947] A. C. 362		British Movietonews Ld. *v.* London and District Cinemas Ld.	190
Wilchick *v.* Marks and Silverstone	[1934] 2 K. B. 56	*Appl.*	Mint *v.* Good	517
Williams *v.* Ellis	5 Q. B. D. 175	*Dist.*	Corkery *v.* Carpenter	102
Williams Bros. *v.* E. T. Agius Ld.	[1914] A. C. 510	*R.*	Biggin & Co. Ld. *v.* Permanite Ld.	422
Wilson (Lady) *v.* Abel	2 M. & S. 541		Parkinson *v.* Barclays Bank Ld.	368
Wilson *v.* Harper	[1908] 2 Ch. 370		Sellers *v.* London Counties Newspapers	784
Winchester Court *v.* Miller	[1944] K. B. 734	*R.*	Mills *v.* Bryce	757
Winter Garden Theatre (London) Ld. *v.* Millennium Productions Ld.	[1948] A. C. 173	*R.*	Foster *v.* Robinson	149
Winter German Opera Co. Ld., *In re*	23 T. L. R. 622	*R.*	Gould *v.* Minister of National Insurance	731
Wood *v.* Burgess	24 Q. B. D. 162	*C.*	Kat *v.* Diment	34

Wright *v.* Callwood .	[1950] 2 K. B. 515		Brock *v.* Richards	529
Wright *v.* Ingle .	16 Q. B. D. 379	*R.*	Nalder *v.* Ilford Corporation .	822
Wringe *v.* Cohen .	[1940] 1 K. B. 229	*Appl.*	Mint *v.* Good .	517
Yates *v.* Reg. .	14 Q. B. D. 648	*R.*	Howgate *v.* Bagnall .	265
Yeudall *v.* Sweeney .	1922 S. C. (J.) 32	*R.*	Duncan *v.* Graham	68
York *v.* Grindstone .	1 Salk. 388 .	*R.*	Williams *v.* Linnitt	565
Yorkshire Dale S.S. Co. *v.* Minister of War Transport	[1942] A. C. 706	*Appl.*	Howgate *v.* Bagnall .	265
Young *v.* Bristol Aeroplane Co. Ld.	[1944] K. B. 718	*Appl.*	Holloway *v.* Mobberley & Perry Ld. . Rex *v.* Northumberland Compensation Appeal Tribunal .	316 711
Young *v.* Bristol Aeroplane Co. Ld.	[1946] A. C. 163	*R.*	Mint *v.* Good .	517
Young *v.* Docherty .	1929 S. C. (J.) 57	*C.*	Duncan *v.* Graham	68
Young, *In re*, Vitale, *Ex parte*	47 L. T. 480 .		Foster *v.* Robinson	149

STATUTES JUDICIALLY CONSIDERED

1215

Magna Carta, 1215, *c.* 20. Rex *v.* Morris **C. C. A. 394**

1360

Justice of the Peace Act, 1360 (34 *Edw.* 3, *c.* 1). Rex *v.* London Sessions; *Ex p.* Beaumont - - **Divl. Ct. 557**

1677

Statute of Frauds, 1677 (29 *Car.* 2, *c.* 3), *s.* 4. James *v.* Thomas H. Kent & Co. Ld. **C. A. 551**

1688

Bill of Rights, 1688 (1 *Will. & Mary*, *sess.* 2, *c.* 2). Rex *v.* Morris **C. C. A. 394**

1696

Plate Act, 1696 (8 & 9 *Will.* 3, *c.* 8), *s.* 9. Westwood *v.* Cann **Pritchard, J. 325**

1719

Plate Duty Act, 1719 (6 *Geo.* 1, *c.* 11), *s.* 3. Westwood *v.* Cann **Pritchard, J. 325**

1738

Plate (Offences) Act, 1738 (12 *Geo.* 2, *c.* 26), *ss.* 1, 5, 6, 22. Westwood *v.* Cann **Pritchard, J. 325**

1798

Gold Plate (Standard) Act, 1798 (38 *Geo.* 3, *c.* 69), *ss.* 1, 2, 4. 6. Westwood *v.* Cann **Pritchard, J. 325**

1824

Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 4. Rex *v.* Harris - **C. C. A. 107**

1839

Metropolitan Police Act, 1839 (2 & 3 *Vict.* *c.* 47), *s.* 50. Rex *v.* London Quarter Sessions; *Ex p.* Bowes **Divl. Ct. 383**

—— —— *s.* 54, *sub-s.* 6. Rex *v.* London Sessions; *Ex p.* Beaumont **Divl. Ct. 557**

—— —— *s.* 66. Willey *v.* Peace **Divl. Ct. 94**

1848

Summary Jurisdiction Act, 1848 (11 & 12 *Vict.* *c.* 43), *s.* 5. Ferguson *v.* Weaving - - - **Divl. Ct. 814**

—— —— *s.* 10. Moore *v.* Ray **Divl. Ct. 98**

1854

Gold and Silver Wares Act, 1854 (17 & 18 *Vict.* *c.* 96), *ss.* 1, 4. Westwood *v.* Cann - - - **Pritchard, J. 325**

1855

Wedding Rings Act, 1855 (18 & 19 *Vict.* *c.* 60), *s.* 1. Westwood *v.* Cann **Pritchard, J. 325**

1871

Prevention of Crimes Act, 1871 (34 & 35 *Vict.* *c.* 112), *s.* 12. Willey *v.* Peace **Divl. Ct. 94**

—— —— *s.* 15. Rex *v.* Harris **C. C. A. 107**

1872

Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict. c.* 65), *ss.* 3, 4. O'Dea *v.* Tetau - - - **Divl. Ct. 184**

Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 12. Corkery *v.* Carpenter **Divl. Ct. 102**

1876

Customs Consolidation Act, 1876 (39 & 40 *Vict. c.* 36). Rex *v.* Morris **C. C. A. 394**

—— —— ss. 186, 259. Rex *v.* Cohen **C. C. A. 505**

1886

Guardianship of Infants Act, 1886 (49 & 50 *Vict. c.* 27), *ss.* 5, 9. Rex *v.* Sandbach Justices; *Ex p.* Smith **Divl. Ct. 62**

1887

Merchandise Marks Act, 1887 (50 & 51 *Vict. c.* 28), *s.* 2, *sub-ss.* 1 *and* 2. Kat *v.* Diment - - - **Divl. Ct. 34**

1889

Factors Act, 1889 (52 & 53 *Vict. c.* 45), *s.* 2, *sub-s.* 1. Pearson *v.* Rose & Young, Ld. - - - - - **C. A. 275**

Interpretation Act, 1889 (52 & 53 *Vict. c.* 63), *s.* 37. Rex *v.* Minister of Town and Country Planning; *Ex p.* Montague Burton, Ld. - **C. A. 1**

—— —— *s.* 38, *sub-s.* 2. Boddington *v.* Wisson - - - **C. A. 606**

1891

Penal Servitude Act, 1891 (54 & 55 *Vict. c.* 69), *s.* 1, *sub-s.* 2. Rex *v.* Morris **C. C. A. 394**

1892

Gaming Act, 1892 (55 & 56 *Vict. c.* 9), *s.* 1. MacDonald *v.* Green **C. A. 594**

1894

Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 267, 271. Duncan *v.* Graham - - - **Divl. Ct. 68**

1896

Friendly Societies Act, 1896 (59 & 60 *Vict. c.* 25), *s.* 94, *sub-s.* 1. Longdon-Griffiths *v.* Smith **Slade, J. 295**

1908

Post Office Act, 1908 (8 *Edw.* 7, *c.* 48), *s.* 65, *sub-s.* 1. Winkle *v.* Wiltshire **Divl. Ct. 684**

1913

Bankruptcy and Deeds of Arrangement Act, 1913 (3 & 4 *Geo.* 5, *c.* 34), *s.* 15. Curtis *v.* Maloney - - - **C. A. 736**

1915

Indictments Act, 1915 (5 & 6 *Geo.* 5, *c.* 90), *s.* 5, *sub-s.* 1. Rex *v.* Pople **C. C. A. 53**

1916

Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *ss.* 2, 1, *sub-s.* 2 (*iii*). Rose *v.* Matt **Divl. Ct. 810**

1918

Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40). *All Schedules Rules, R.* 23 (2). Jaworski *v.* Institution of Polish Engineers in Great Britain, Ld. **C. A. 768**

1920

Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-s.* 1 (*b*), *s.* 3, *sub-s.* 2. Mills *v.* Bryce **C. A. 757**

—— —— *s.* 5, *sub-s.* 2 (*as amended by the Rent and Mortgage Interest Restrictions Act*, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 4). Yates *v.* Morris **C. A. 77**

—— —— *s.* 12, *sub-s.* 1. Stagg *v.* Brickett **C. A. 648**

—— —— *s.* 12, *sub-s.* 1 (*g*). American Economic Laundry, Ld. *v.* Little **C. A. 400**

Tinkham *v.* Perry - **C. A. 547**

Langdon *v.* Horton - **C. A. 666**

—— —— *s.* 12, *sub-s.* 3. Rex *v.* Sidmouth Rent Tribunal; *Ex p.* Sellek **Divl. Ct. 778**

—— —— *s.* 15, *sub-s.* 1. John M. Brown, Ld. *v.* Bestwick - - - **C. A. 21**

Guardianship of Infants Act, 1925 (15 & 16 *Geo.* 5, *c.* 45), *s.* 7, *sub-s.* 1. Rex *v.* Sandbach Justices; *Ex p.* Smith **Divl. Ct. 62**

Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 47. Holloway *v.* Mobberley and Perry, Ld. **C. A. 316**

1921

Licensing Act, 1921 (11 & 12 *Geo.* 5, *c.* 42), *s.* 4. Ferguson *v.* Weaving **Divl. Ct. 814**

1923

Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 10, *sub-s.* 1. Stagg *v.* Brickett **C. A. 648**

1926

Penal Servitude Act, 1926 (16 & 17 *Geo.* 5, *c.* 58), *s.* 1, *sub-s.* 1. Rex *v.* Morris **C. C. A. 394**

University of London Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 46), *ss.* 4, 5. Rex *v.* Dunsheath; *Ex p.* Meredith **Divl. Ct. 127**

1927

Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *ss.* 4, 5, *sub-ss.* 1, 2. Kerridge *v.* Lamdin - **C. A. 478**

1930

Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 1; *s.* 3, *sub-ss.* 1 *and* 3. Garner *v.* Burr - - - **Divl. Ct. 31**

—— —— *s.* 21 (*c*). Holt *v.* Dyson **Divl. Ct. 364**

— —— *s.* 35, *sub-ss.* 1, 2. Pilbury *v.* Brazier - - **Divl. Ct. 340**

1933

Children and Young Persons Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 12), *ss.* 61, 62. Drover *v.* Rugman **Divl. Ct. 380**

Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *Sch.* 1, *para.* (*a*). R. M. R. Housing Society Ld. *v.* Combs - - **C. A. 486**

—— —— *Sch.* 1, *para.* (*b*). Yates *v.* Morris **C. A. 77**

—— —— *Sch.* 1, *para.* (*d*). Regional Properties Co. Ld. *v.* Frankenschwerth and Chapman **C. A. 631**

Summary Jurisdiction (Appeals) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 38), *s.* 1. Drover *v.* Rugman - - **Divl. Ct. 380**

1935

Finance Act, 1935 (25 *&* 26 *Geo.* 5, *c.* 24), *s.* 15. Rex *v.* Morris **C. C. A. 394**

Increase of Rent and Mortgage Interest (Restrictions) Act, 1935 (25 *Geo.* 5, *c.* 13), *s.* 1. Langdon *v.* Horton **C. A. 666**

1936

Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 188, *sub-s.* 1. Nalder *v.* Ilford Corporation **Sellers, J. 822**

Public Health Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *s.* 65, *sub-ss.* 1, 3 *and* 4; *s.* 300, *sub-ss.* 1 *and* 3; *s.* 343, *sub-s.* 1. Nalder *v.* Ilford Corporation **Sellers, J. 822**

—— —— *ss.* 92, 93, 259. Neath Rural District Council *v.* Williams **Divl. Ct. 115**

1937

Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 13, *sub-s.* 1. Burns *v.* Joseph Terry & Sons Ld. **C. A. 454**

—— —— *s.* 23, *sub-s.* 1 (*a*). Beadsley *v.* United Steel Companies, Ld. **C. A. 408**

—— —— *s.* 25, *sub-s.* 1; *s.* 26, *sub-s.* 1. Davies *v.* De Havilland Aircraft Co., Ld. **Somervell, L.J. 50**

—— —— *s.* 42. Clifford *v.* Charles H. Challen & Son Ld. **C. A. 495**

Firearms Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 12), *s.* 23, *sub-s.* 2. Rex *v.* Harris **C. C. A. 107**

Local Government Superannuation Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 68), *ss.* 8, 35. Walter *v.* Eton Rural District Council - - **C. A. 84**

1938

Food and Drugs Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *s.* 3, *sub-s.* 1; *s.* 83. Moore *v.* Ray - - - **Divl. Ct. 98**

—— —— *s.* 81, *sub-s.* 1. Preston *v.* Fennell **Divl. Ct. 16**

1939

Import, Export and Customs Powers (Defence) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 69), *s.* 3, *sub-s.* 1. Roe *v.* Hemmings **Divl. Ct. 676**

Personal Injuries (Emergency Provisions) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 82), *s.* 3, *sub-s.* 1; *s.* 8, *sub-s.* 1. Howgate *v.* Bagnall - - **Barry, J. 265**

Rent and Mortgage Interest Restrictions Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 2. Stagg *v.* Brickett **C. A. 648**

— —— *s.* 7, *sub-ss.* 2 *and* 3. Rex *v.* Sidmouth Rent Tribunal; *Ex p.* Sellek **C. A. 778**

1940

Finance (No. 2) Act, 1940 (3 *&* 4 *Geo.* 6, *c.* 48), *s.* 18, *sub-s.* 1; *s.* 19, *sub-s.* 1; *Sch. VII*, *No.* 23. Coleborn (T.) & Sons, Ld. *v.* Blond - **C. A. 43**

1943

Income Tax (Employments) Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 45), *s.* 1. Jaworski *v.* Institution of Polish Engineers in Great Britain, Ld. - **C. A. 768**

1944

Town and Country Planning Act, 1944 (7 *&* 8 *Geo.* 6, *c.* 47), *s.* 1, *sub-s.* 1. Rex *v.* Minister of Town and Country Planning; *Ex p.* Montague Burton, Ld. - - - - - **C. A. 1**

1946

Acquisition of Land (Authorisation Procedure) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 49). Earl Fitzwilliam's Wentworth Estates, Co. *v.* Minister of Town and Country Planning **Birkett, J. 203**

Building Restrictions (War-Time Contraventions) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 35), *s.* 1, *sub-s.* 1; *s.* 3, *sub-s.* 1 (*a*); *s.* 7, *sub-s.* 1. Nalder *v.* Ilford Corporation **Sellers, J. 822**

Finance Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 64), *s.* 16, *sub-ss.* 1 *and* 3, *Sch. IV.* Coleborn (T.) & Sons, Ld. *v.* Blond - - - - **C. A. 43**

Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 34). Shackleton *v.* Greenhalgh **C. A. 725**

—— —— *s.* 2, *sub-s.* 1. Rex *v.* London, etc., Rent Tribunal; *Ex p.* Honig **Divl. Ct. 641**

—— —— *s.* 5. Alexander *v.* Springate **Streatfeild, J. 803**

National Insurance (Industrial Injuries) Act, 1946 (9 *&* 10 *Geo.* 6, *s.* 62), *s.* 1, *sub-s.* 2 (*a*) (*b*). Gould *v.* Minister of National Insurance **Ormerod, J. 731**

—— —— *s.* 89, *sub-s.* 1, *proviso* (*a*). Holloway *v.* Mobberley and Perry, Ld. **C. A. 316**

1947

London County Council (General Powers) Act, 1947 (10 *&* 11 *Geo.* 6, *c.* xlvi), *s.* 15, *sub-s.* 1; *s.* 17, *sub-s.* 2; *s.* 29, *sub-s.* 1 (*a*). Newman *v.* Lipman **Divl. Ct. 333**

Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 23, 51, 55, 75. Higham *v.* Havant and Waterloo Urban District Council **Divl. Ct. 509**

—— —— *s.* 43, *sub-ss.* 1, 2, 4. Earl Fitzwilliam's Wentworth Estates Co. *v.* Minister of Town and Country Planning - - **Birkett, J. 203**

—— —— *s.* 53, *sub-s.* 1 (*a*). East End Dwellings Co. Ld. *v.* Finsbury Borough Council - **C. A. 441**

—— —— *Sch. X, para.* 16. Rex *v.* Minister of Town and Country Planning; *Ex p.* Montague Burton, Ld. **C. A. 1**

Transport Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 49), *s.* 2, *sub-s.* 1 (*e*). Hotels Executive *v.* Derby Corporation **Divl. Ct. 91**

1948

Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 1, *sub-s.* 1. Howkins *v.* Jardine - - **C. A. 614**

—— —— *s.* 92, *sub-s.* 3. Egerton *v.* Rutter **Lord Goddard, C.J. 472**

Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58). Rex *v.* Morris **C. C. A. 394**

—— —— *s.* 3, *sub-s.* 1 : *s.* 11, *sub-s.* 2 : *s.* 13. Rex *v.* Parry - **C. C. A. 590**

—— —— *s.* 12. Rex *v.* Harris **C. C. A. 107**

—— —— *s.* 23, *sub-s.* 1: *s.* 29, *sub-ss.* 1, 3. Rex *v.* Grant - - **C. C. A. 500**

—— —— *s.* 29, *sub-s.* 1: *s.* 37, *sub-s.* 1 (*a*). *In re* Whitehouse - **Divl. Ct. 673**

—— —— *s.* 36, *sub-ss.* 1 *and* 2. Rex *v.* London Sessions, *Ex p.* Beaumont **Divl. Ct. 557**

Gas Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 67), *ss.* 22 *and* 36. O'Meara *v.* South Eastern Gas Board - - - **C. A. 307**

Finance Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 49), *s.* 20. *Sch. VIII, group* 20 (1), Customs and Excise Commissioners *v.* E. Keil & Co. Ld. **Croom-Johnson, J. 469**

Local Government Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *s.* 85, *sub-s.* 1; *s.* 86, *sub-ss.* 1 *and* 2. Hotels Executive *v.* Derby Corporation - - **Divl. Ct. 91**

1949

Landlord and Tenant (Rent Control) Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 1. Rex *v.* Hampstead and St. Pancras Rent Tribunal; *Ex p.* Goodman **Divl. Ct. 541**

—— —— *s.* 1, *sub-s.* 1. Rex *v.* London, etc., Rent Tribunal, *Ex p.* Honig **Divl. Ct. 641**

Rex *v.* Sidmouth Rent Tribunal; *Ex p.* Sellek - **C. A. 778**

—— —— *s.* 2, *sub-s.* 1. Barker *v.* Levinson **Divl. Ct. 342**

—— —— *s.* 2, *sub-ss.* 1, 5 *and* 7. Regor Estates, Ld. *v*, Wright **C. A. 689**

—— —— *ss.* 7, 9. Shackleton *v.* Greenhalgh - - **C. A. 725**

Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *s.* 1, *sub-s.* 7 (*b*) : *s.* 2, *sub-s.* 2: *s.* 6, *sub-ss.* 5, 6 *and* 9. Daley *v.* Diggers Ld. **Hilbery, J. 661**

RULES, ORDERS, AND INSTRUMENTS JUDICIALLY CONSIDERED

R. S. C. Ord. 16A, *r.* 12. Clayson *v.* Rolls Royce, Ld. and Evans Lifts, Ld. **C. A. 746**

—— *Ord.* 25, *r.* 5. Howard *v.* Pickford Tool Co., Ld. - - - - - **C. A. 417**

—— *Ord.* 31, *r.* 1A. Adams *v.* Sunday Pictorial Newspapers (1920) Ld. and Champion - - **C. A. 354**

—— —— *r.* 19A (2). Westminster Airways, Ld. *v.* Kuwait Oil Co., Ld. **C. A. 134**

Gold Wares (Standard of Fineness) Order, 1932 (*St. R. & O.* 1932, *No.* 654). Westwood *v.* Cann **Pritchard, J. 325**

Defence (General) Regulations, 1939 (*St. R. & O.* 1941, *Nos.* 1774 *and* 2052, 1943, *No.* 200), *reg.* 62, *para.* 4A. *Reg.* 99B. Boddington *v.* Wisson **C. A. 606**

Defence Regulations (No. 3), 1948 (*S.I.* 1948, *No.* 336). Boddington *v.* Wisson **C. A. 606**

Export of Goods (Control) (Consolidation) Order, 1949 (*S.I.* 1949, *No.* 2466). Roe *v.* Hemmings **Divl. Ct. 676**

Industrial Injuries (Stamps) Regulations, 1948 (*S.I.* 1948, *No.* 1443). Winkle *v.* Wiltshire - **Divl. Ct. 684**

Motor Vehicles (Construction and Use) Regulations (*St. R. & O.* 1947, *No.* 670), *regs.* 3, 49, 50, 51, *and* 60. Garner *v.* Burr - - - **Divl. Ct. 31**

Personal Injuries (Civilians) Scheme, 1939, (*St. R. & O.* 1939, *No.* 1143), *art.* 27, *para.* 2. Howgate *v.* Bagnall **Barry, J. 265**

Purchase Tax (Charges) (No. 1) *Order*, 1947 (*St. R. & O.* 1947, *No.* 1182). Coleborn (T.) & Sons, Ld. *v.* Blond **C. A. 43**

ERRATA

R. M. R. Housing Society Ld. *v.* Combs, ante, p. 486.
At p. 494, line 31, for "p. 24" read "p. 148".

Gould *v.* Minister of National Insurance.
At p. 734, footnote (2), for "1938" read "1928".

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

REX *v.* MINISTER OF TOWN AND COUNTRY PLANNING. *Ex parte* MONTAGUE BURTON LIMITED AND OTHERS.

C. A.

1950
June 20.

Tucker, Asquith and Jenkins L.JJ.

Town and Country Planning—Repair of war damage—Compulsory purchase of land—Proceedings by local authorities under Town and Country Planning Act, 1944*—Direction by Minister for continuance after coming into force of Act of* 1947*—Validity—Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63), *s.* 37*—Town and Country Planning Act,* 1944 (7 *&* 8 *Geo.* 6, *c.* 47), *s.* 1, *sub-s.* 1*—Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *Sch. X, para.* 16.

Applied. USHER *v.* BARLOW [1952] 1 Ch. 255

In December, 1946, two local authorities applied to the Minister of Town and Country Planning, under s. 1 of the Town and Country Planning Act, 1944, for orders declaring specified areas of land within their boroughs subject to compulsory purchase for dealing with war damage. On August 6, 1947, the Town and Country Planning Act, 1947, received the Royal Assent. That Act repealed s. 1 of the Act of 1944. On February 9, 1948, the Minister made an order fixing July 1 of that year as the appointed day for the coming into force of certain provisions of the Act of 1947 which did not come into operation immediately on the passing of the Act. Among those delayed provisions was para. 16 of Sch. X, which provided that where at any time before the appointed day application had been made to the Minister for an order under s. 1 of the Act of 1944 the Minister might, if he thought fit, direct that proceedings on the application should be continued under that Act after that date; and that where any such direction was given ss. 1 and 13 of, and Sch. I to, the Act of 1944 should continue to apply in relation to the application, and an order might be made on it. On June 16, 1948, the Minister, by letter, gave a direction, under para. 16 of Sch. X, that proceedings on the applications should be continued under the Act of 1944 after the appointed day for the coming into force of the Act of 1947. Public inquiries were thereupon held, and compulsory purchase orders were made. Certain owners or occupiers of property within the specified areas applied to the Divisional Court for an order of certiorari to quash the orders on the ground that the direction of June 16, 1948, was invalid, the Minister having no power to give it because para. 16 of Sch. X to the Act of 1947 had not come into force at that date. The Divisional Court dismissed the motion. On appeal:—

Held, that s. 37 of the Interpretation Act gave power to the Minister to take the steps necessary to set up the machinery for bringing the Act of 1947 into operation, and therefore to make such an order as that of June 16, 1948, and not merely to do such an act as appointing a day for the Act to come into operation; and that, having regard to para. 16 of Sch. X, the order contained in the letter of June 16, 1948, was valid notwithstanding that it was made before the appointed day.

Held, further, that s. 120 of the Act of 1947, which provides by sub-s. 1, "This Act may be cited as the Town and Country Planning "Act, 1947," and by sub-s. 2, "This Act shall come into force on "the appointed day: Provided that" [certain sections, of which s. 120 was not one] "shall come into force on the date of the passing "of this Act," must be given its natural and ordinary meaning, namely, that it necessarily came into operation with the passing of the Act on August 6, 1947.

Decision of the Divisional Court (1949) 66 T. L. R. (Pt. 1) 141, affirmed.

APPEAL from the Divisional Court (1).

On December 23, 1947, the Corporations of Liverpool and Hull, respectively, applied to the Minister of Town and Country Planning, under s. 1 of the Town and Country Planning Act, 1944 (2), for orders declaring specified areas of land within those cities subject to compulsory purchase for the purpose of dealing with war damage. On August 6, 1947, the Town and Country Planning Act, 1947, received the Royal Assent. That Act, by s. 113, sub-s. 2, and Part II of Sch. IX, repealed s. 1 of the Act of 1944 as from the appointed day on which the Act of 1947 came into operation, which, by order of the Minister made on February 9, 1948, was declared to be July 1, 1948. Para. 16 of Sch. X to the Act of 1947 (3), however, provided that where at any time before the appointed day application had been made for an order under s. 1 of the Act of 1944 the Minister might, if he thought fit, direct that proceedings on the application should be continued under that Act after that date; and that where any such direction was given ss. 1 and 13 of, and Sch. I to, the Act of 1944 should continue to apply, and an order might be made thereon.

---

(1) (1949) 66 T. L. R. (Pt. 1) 141.

(2) Town and Country Planning Act, 1944, s. 1: "Where the Minister of Town and Country Planning (in this Act referred to as "'the Minister') is satisfied that "it is requisite, for the purpose of "dealing satisfactorily with extensive war damage in the area of a "local planning authority, that a "part or parts of their area, consisting of land shown to his satisfaction to have sustained war damage "or of such land together with other "land contiguous or adjacent thereto, "should be laid out afresh and redeveloped as a whole, an order "declaring all or any of the land in "such a part of their area to be "land subject to compulsory purchase for dealing with war damage "may be made by the Minister if "an application in that behalf is "made to him by the authority "before the expiration of five years "from such date as the Minister "may by order appoint as being the "date when the making of such application has become practicable."

On June 16, 1948, which was before the appointed day, the Minister, by letter, gave a direction under para. 16 of Sch. X. Public inquiries were then held, and orders for compulsory purchase were made by the Minister.

On December 19, 1949, the present applicants, who were the owners or occupiers of property within the specified areas, applied to the Divisional Court for orders of certiorari to quash the orders made by the Minister on the ground that the direction given on June 16, 1948, was invalid, it having been given before para. 16 of Sch. X had come into operation on the appointed day. The Divisional Court dismissed the applications, and the applicants now appealed.

Glidewell for all the applicants. The same point arises in each of these cases, viz., whether the direction given by the Minister in a letter dated June 16, 1948, and addressed to the town clerks of the two cities, was a valid direction under the Act of 1947. Section 1 of the Act of 1944 was, among other sections, repealed by s. 113, sub-s. 2, and Sch. IX, Part II of the Act of 1947. Para. 16 of Sch. X to the Act of 1947 was among the provisions of that Act which were not to come into operation until the appointed day; and until July 1, 1948, the appointed day, the powers given to the Minister by that paragraph did not arise.

---

(3) Town and Country Planning Act, 1947; Tenth Schedule, para. 16: "Where, at any time before "the appointed day, application has "been made to the Minister for an "order under section one of the Act "of 1944 declaring any land to be "subject to compulsory purchase "under Part I of that Act, the "Minister may, if he thinks fit, "direct that proceedings on the "application shall be continued "under that Act after that day; and "where any such direction is given, "section one of the Act of 1944, and "section thirteen of that Act and "the First Schedule of that Act so "far as they relate to an order "under the said section one, shall "continue to apply in relation to "the application, and an order may "be made thereon accordingly".

Therefore, so far as the Act of 1947 is concerned, there was no power to make a direction on June 16, 1948. Section 37 of the Interpretation Act, 1889, (4) has no application to the present case.

Reading ss. 36, sub-s. 1, and 37 of the Act of 1889 together it follows that power is only given to do something which is necessary or expedient for the purpose of bringing the Act into operation, whereas the direction given by the letter of June 16, 1948, was solely for the purpose of continuing proceedings under the Act of 1944. It is not contended that the appointed day was not properly designated, but it is submitted that it could only be designated under s. 37 of the Interpretation Act.

Even if a direction could be given under para. 16 of Sch. X it could only be given by statutory instrument, because it would be a delegated legislative act or an act of a legislative character: see the observations of Scott L.J. in *Blackpool Corporation* v. *Locker* (5); see also the Statutory Instruments Act, 1946. The direction was void and the compulsory purchase orders should be quashed.

Sir Hartley Shawcross A.-G. and *J. P. Ashworth* for the Minister. The direction given by the Minister under para. 16 of Sch. X was a purely executive act for the purpose of bringing particular proceedings or premises within the scope of that or following paragraphs. It is not, however, conceded that, if this order was such that it ought to have been published as a statutory instrument, it follows that it is void. The observations of Scott L.J. in *Blackpool Corporation* v. *Locker* (6) were treated as obiter in *Lewisham Borough Council* v. *Roberts* (7). As the Act of 1947 created powers which were greater than those in the Act of 1944 it was obviously desirable when the Act of 1947 came into operation that the earlier statute should be kept alive in relation to operations already proceeding under it, unless it were clear that the Minister was able to make the necessary orders before the machinery under the Act of 1944 was swept away. If directions could only be given under para. 16 of Sch. X after the appointed day there would be nothing on which those directions could operate. They could not revive what had already died. That was clearly contemplated by s. 37 of the Interpretation Act, 1889. This is clearly a case where, in connexion with the repeal provisions of the Act of 1947, it was "necessary or expedient" to direct in advance what operations should continue notwithstanding the general repeal. On neither merits nor technical grounds should these appeals be allowed.

---

(4) Interpretation Act, 1889, s. 37: "Where an Act passed after "the commencement of this Act is "not to come into operation immediately on the passing thereof, and "confers power to make any appoint"ment, to make, grant, or issue "any instrument . . . letters patent, "rules, regulations, or bye-laws, to "give notices . . . or to do any "other thing for the purposes of the "Act, that power may, unless the "contrary intention appears, be "exercised at any time after the "passing of the Act, so far as may "be necessary or expedient for the "purpose of bringing the Act into "operation".

(5) [1948] 1 K. B. 349.

(6) Ibid.

(7) [1949] 2 K. B. 608.

TUCKER L.J. [after stating the facts]. It is said for the applicants in the first instance that under the Act of 1947, standing alone, the Minister could never bring that Act into operation at all, and the argument is as follows:— Section 120 of the Town and Country Planning Act, 1947, provides: "(1.) This Act may be "cited as the Town and Country Planning Act, 1947. (2.) This "Act shall come into force on the appointed day: Provided that" [certain sections which are there referred to] "shall come into "force on the date of the passing of this Act". The sections referred to as coming into force on the date of the passing of the Act do not include s. 120, which is the section which provides for the appointed day, and it is accordingly said that the Minister cannot appoint a day until the Act has come into operation and the Act cannot come into operation until he has appointed a day, and the result is that the Act can never come into operation.

That ingenious argument does not appeal to me because I think that the ordinary and natural interpretation must be given to the section which itself brings the Act into operation, namely, that it must necessarily come into operation with the passing of the Act, which was on August 6, 1947. Any other interpretation would really make nonsense of the provisions of the Act. However that may be, it is conceded by Mr. Glidewell for the applicants that the appointed day was effectively designated, but he says that that was only by virtue of the provisions of s. 37 of the Interpretation Act, 1889. In fact he says that the designating of an appointed day is the very thing, and one of the few things, that is covered by s. 37 of the Interpretation Act. [His Lordship read the section and continued:] Mr. Glidewell conceded that that section gives power to the Minister to appoint a day under the Act of 1947. On February 9, 1948, he did make such an order, and the appointed day was July 1, 1948. But it is said that the letter of June 16, 1948, is invalid because the direction given by that letter was not one given for the purpose of bringing the Act into operation, and he says that that is the only direction which can properly be given by virtue of s. 37.

In order to consider that point it is necessary to refer to s. 113 of the Act of 1947. Sub-section 2 provides: "Subject to the "provisions of this section, the enactments specified in the Ninth "Schedule to this Act are hereby repealed in the case of enact"ments specified in Part I of that Schedule, as from the passing "of this Act, and in the case of the enactments specified in Part II "of that Schedule, as from the appointed day, to the extent "specified in relation thereto in the third column of that "Schedule". From Part II of Sch. IX it appears that the Town and Country Planning Act, 1944, ss. 1 to 14, are repealed, and, of course, s. 1 is the section under which the applications were originally made. Section 113, sub-s. 5 provides: "Without "prejudice to the provisions of s. 38 of the Interpretation Act, "1889 (which relates to the effect of repeals), the provisions of "the Tenth Schedule to this Act (being transitory and consequential provisions) shall have effect in relation to the repeals "effected by this section". Paragraph 16 of Sch. X reads as follows: "Where, at any time before the appointed day, application has been made to the Minister for an order under section "one of the Act of 1944 declaring any land to be subject to compulsory purchase under Part I of that Act, the Minister may, "if he thinks fit, direct that proceedings on the application shall "be continued under that Act after that day; and where any such "direction is given, section one of the Act of 1944, and section "thirteen of that Act and the First Schedule to that Act so far "as they relate to an order under the said section one, shall "continue to apply in relation to the application, and an order "may be made thereon accordingly".

The argument is that the letter of June 16, 1948, being written before the appointed day, is not authorized by para. 16 of that schedule, and that it does not come within the language of s. 37 of the Interpretation Act, 1889.

In my view, s. 37 applies to the present case. I think that it clearly gives power to take the necessary steps to set up the machinery for bringing the Act into operation as well as for doing such an act as appointing a day for the Act to come into operation. The words in s. 37 referring to regulations, bye-laws, notices, prescribed forms, and so forth, make it clear that matters of that kind may be made under s. 37 so that the necessary machinery will function as soon as the new Act comes into operation and things shall not come to a standstill by reason of the repeal of the existing Act.

In the present case there were these applications pending under s. 1 of the Act of 1944. I think that that is just the kind of thing that is contemplated by s. 37 of the Interpretation Act, 1889, and that, having regard to para. 16 of Sch. X to the Act of 1947, the order contained in the letter of June 16, 1948, was valid notwithstanding that it was made before the appointed day.

A further point was adumbrated by Mr. Glidewell, namely, that the letter of June 16, 1948, is a nullity because, he says, under para. 16 of Sch. X the Minister is given power to legislate or to do something which amounts to legislation, as distinct from the exercise of his executive powers; that he could exercise those powers only by means of a statutory instrument within the meaning of the Statutory Instruments Act, 1946; that he has not purported to make such an instrument; and that the letter is void.

There is no mention of that point in the judgment of the Divisional Court, and the application to that court for leave to apply for certiorari contains no mention of the point either. The grounds on which the application to the Divisional Court was based were " that the said order of the said Minister is bad in law in that " the said Minister had no power to make the same, s. 1 of the " Town and Country Planning Act, 1944, and all other relevant " sections of the said Act, having been repealed on the 1st day of " July, 1948, by and under the provisions of the Town and Country " Planning Act, 1947 ".

Order 59 r. 3 (2) of the Rules of the Supreme Court provides: " An application for such leave as aforesaid shall be " made ex parte to a Divisional Court of the King's Bench Division, " except in vacation . . . and shall be accompanied by a statement " setting out the name and description of the applicant, the relief " sought, and the grounds on which it is sought, and by affidavits " verifying the facts relied on ". Rule 6 provides for copies of the statements and affidavits being supplied, and, by r. 6 (2): " The " court or judge may on the hearing of the motion or summons " allow the said statement to be amended, and may allow further " affidavits to be used if they deal with new matter arising out of " the affidavits or any other party to the application, and where " the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his " intention and of any proposed amendment of his statement, and " shall supply on demand and upon payment of the proper charges " copies of any such further affidavits ".

No application was made to amend the grounds in support of these applications. Although we are told by Mr. Glidewell—and, of course, I accept what he says—that counsel who appeared with him on these applications to the Divisional Court did take this point in argument, the fact that no mention of it is made in the judgment of the Divisional Court and the facts that it does not appear in the original grounds and that no application was made to amend indicate, to my mind, that the Divisional Court did not consider that the point was one which was open to the applicants. However that may be, I think that it is not open to the applicants in this court. I am not satisfied that the Divisional Court had, or that this court really has, all the necessary material for determining this point, and I accordingly express no view with regard to the matters which were tentatively put before us under that heading.

C. A.
1950

REX
v.
MINISTER OF TOWN AND COUNTRY PLANNING.
MONTAGUE BURTON LD. AND OTHERS,
Ex parte.

Tucker L.J.

I agree with the judgment of the Divisional Court and think that these appeals must fail.

ASQUITH L.J. I agree. I think that the only point of substance raised by counsel for the applicants in his ingenious argument was this: he argued that s. 37 of the Interpretation Act did not apply because the giving of the directions contained in the letter of June 16, 1948, was not necessary or expedient for the purpose of bringing the Act of 1947 into operation. He appeared to submit that nothing could be " necessary or expedient " for this purpose except such an act as fixing the appointed day itself. I cannot agree that the words should receive so restricted an interpretation. It seems to me that the preservation of the applications made under the Act of 1944 was necessary and expedient for the purpose of giving the Act of 1947 material upon which to operate, and that this is enough to satisfy the words " for the purpose of bringing the Act into operation ". For those reasons, and the others given by my Lord, I agree that the appeals should be dismissed.

JENKINS L.J. I also agree.

Appeals dismissed.

Solicitors: *Warren, Murton & Co., for H. A. Dodman, Leeds; Warren, Murton & Co. (for the applicants in the second application); Treasury Solicitor; Sharpe, Pritchard & Co., for the Town Clerks, Hull and Liverpool.*

A. W. G.

Affirmed. C.A. [1951] 2 All E.R. 85.

Affirmed [1951] 2 K. B. 476

1950
July 4.

Lord Goddard, C.J.

CORY (WILLIAM) & SON LIMITED *v.* LONDON CORPORATION.

Local government—Contract for removal of local authority's refuse—Barges of prescribed type—Contractors to observe authority's by-laws subject to contract—New by-laws requiring barges of a different type—Whether repudiation of contract—Claim to rescission.

On December 17, 1936, an agreement was made between the claimants, a company carrying on business as lightermen and barge owners, and London Corporation, in their capacity as sanitary authority, for the removal of refuse from the City by loading it into barges at a London wharf and dumping it. By cl. 1 of the agreement the contractors were to provide barges fitted and maintained with temporary coamings. By cl. 13, subject to cl. 1, the contractors were to comply with by-laws made by the corporation as port health authority. It was expected that the agreement would remain in force until 1969. On April 29, 1948, the corporation, acting as port health authority, made a by-law, to become effective on November 1, 1950, which required that any vessel hired for removing rubbish must be provided with permanent coamings and close-fitting hatches. The contractors had no barges of the type specified, and to convert their existing barges into the type required would cost from 450*l*. to 500*l*. for each barge. In arbitration proceedings, the contractors claimed that the new by-law had rendered the agreement commercially impracticable from their point of view, and had thus amounted to a repudiation of the agreement, which entitled them to treat it as being rescinded from the date when the by-law was made; and they notified the corporation accordingly by a letter of September 21, 1948.

Held, that, to constitute repudiation, there must be a wrongful act, in the nature of either a breach of contract or a tort, consciously committed by one of the parties in relation to the particular contract said to have been repudiated; that the fact that the corporation, in their capacity as port health authority, made a by-law of general application which, when in operation, would affect not only the contractors, but all persons engaged in the business of refuse removal in London, did not amount to a repudiation of the contractors' agreement from the time when the by-law was made, although, incidentally, it might affect that agreement when the by-law became effective; and that there had accordingly been no repudiation of the agreement by the corporation.

AWARD in the form of a special case stated by an arbitrator.

On December 17, 1936, the claimants, William Cory & Son Ld., a company of lightermen and barge-owners, as contractors, entered into an agreement with London Corporation, as the sanitary authority for the City of London, for the collection removal and disposal of refuse in and from the city. It was provided by the agreement that the contractors should barge or carry away from the premises of the corporation known as Lett's Wharf, Commercial Road, Lambeth, such refuse brought to the wharf by the corporation or their contractors as should be required to be removed therefrom by the Director of Public Cleansing for the City of London, and dispose of the refuse by discharging it at a dump at Hornchurch, Essex.

The agreement was expressed to be for ten years from January 1, 1937, and thereafter until the dump at Hornchurch had reached a specified height, which it was expected would be reached by the year 1969. Clause 1 of the agreement provided that: "The contractors shall . . . provide . . . such a number "of staunch and strong lighters and barges which shall for the

1950

CORY (WILLIAM) & SON LD. v. LONDON CORPORATION.

"purpose of this agreement be fitted and maintained with temporary coamings and coverings to be secured to the permanent "coamings, as will be sufficient to remove the materials aforesaid "from Lett's Wharf. . . ." By cl. 2: "The materials aforesaid "shall be provided at Lett's Wharf . . . in sufficient quantities "to give the lighters and barges of the contractors yearly loadings "representing not less than 30,000, or more than 80,000, tons "per annum". By cl. 13: "Subject to the provisions of cl. 1 "hereof, the contractors shall at all times observe and comply "with the by-laws of the port health authority of the Port of "London for:—(a) the prevention of nuisances arising from "refuse loaded into lighters and barges. . . ." By cl. 15 the contractors were to be paid at the rate of six shillings a ton for the refuse removed by them. Clause 24 provided for a temporary suspension of the agreement if either party were hindered in or prevented from performing it by the happening of certain specified events including "any act of God or by the acts of the King's "enemies or by the regulations of any county council, parochial "or local authority or by government interference. . . ."

At the time when the agreement was made in 1936, by-laws were in existence which had been made by the corporation as the port health authority on December 29, 1894, requiring that refuse should not be loaded or carried in any ship, boat or vessel otherwise than in a suitable tank furnished with a sufficient covering to prevent any nuisance arising therefrom. On April 29, 1948, the corporation in their capacity of port health authority, made new by-laws, No. 2 of which was to take effect on Nov. 1, 1950, and was, so far as material, in the following terms: "A "person who shall remove or transport . . . in or upon any vessel, "within the district of the port health authority, any refuse "shall:—(a) Remove or transport such refuse in a sound, suitable and water-tight vessel provided with permanent coamings "and close fitting hatches to such coamings, capable of completely covering the refuse, and provide waterproof sheeting for "covering such hatches capable of being properly and securely "fixed to such coamings".

It was proved before the arbitrator that the contractors had no barges suitable for transporting refuse which were fitted with permanent coamings and close-fitting hatches and that the cost of converting their existing barges to comply with the requirements of the new by-law would be between 450*l.* and 500*l.* for each barge.

The contractors claimed that the corporation, by making the new by-law, had repudiated the agreement of 1936 and that they were therefore entitled to rescind the agreement, which they purported to do by a letter of September 21, 1948, addressed by them to the corporation. The arbitrator stated the following question for the opinion of the court: "Did the act of the cor-"poration in their capacity as port health authority in sealing "and procuring the confirmation of the new by-laws, confirmed "on July 16, 1948, amount to a repudiation by the corporation "of the agreement of December 17, 1936, so as to entitle the "contractors, in law, notwithstanding that by-law 2 is not to "come into operation until November 1, 1950, to treat the said "agreement as determined on September 21, 1948?"

Harvey K.C. for the contractors. As the result of the corporation's announcement in 1948 of the terms of the new by-law which was to come into force on November 1, 1950, the contractors were entitled to rescind the existing agreement. The effect of the by-law was that the corporation would not tolerate the carrying out of the barging work by vessels of the type specified in the contract of 1936, but would only be satisfied by the employment of vessels of a more expensive kind. It makes no difference whether the corporation announced their decision in the form of a by-law or by a letter addressed to the contractors. In considering the question involved in the present case it is necessary to bear in mind the difference between the frustration of a contract by a supervening illegality and its repudiation by one of the parties: see *Hirji Mulji and Others* v. *Cheong Yue Steamship Co. Ld.* (1).

The present case is one of repudiation, not frustration, and the repudiation took place when the terms of the new by-laws were published in 1948. When that happened, the contractors were entitled to treat the agreement as being rescinded. Not merely were they entitled to make that election, but if they decided to do so, that was the time at which the election must be made: see *Johnstone* v. *Milling* (2) and *Berners* v. *Fleming* (3).

As for the agreement itself, cl. 13 can only be interpreted as meaning that if the by-laws which are made thereafter are such as to make cl. 1 of the agreement an impossibility, the agreement would thereby be frustrated. By making the new by-law the corporation were saying in effect, "we are engineer-"ing a frustration of the contract, which will take place in "1950", and the contractors were entitled to treat that as an anticipatory breach of the agreement which entitled them to rescind it as from the date of their letter of September 21, 1948. It was contended for the corporation before the arbitrator that an act done by them in one capacity in the performance of a statutory duty could not be treated as a repudiation of a contract which they had made in another capacity. It is submitted, however, that the corporation are one and indivisible irrespective of the number of functions they may have to perform. There is no authority which says that because a corporation have a duty to do something, the doing of the thing authorized cannot amount to the repudiation of a contract which they have made; and, in any event, although the corporation had power to make this particular by-law, they were under no obligation to do so.

---

(1) [1926] A. C. 497, 509.
(2) (1886) 16 Q. B. D. 460.
(3) [1925] Ch. 264.

H. B. Williams K.C. and *Wilfrid Hunt* for the corporation. The contractors were not entitled to treat the agreement of 1936 as being repudiated on the passing of the new by-law. It is conceded that when the by-law comes into operation on November 1, 1950, the agreement may be frustrated, but the passing of the by-law in 1948 did not constitute a repudiation of it at that date. When making a by-law of general application in their capacity of port health authority, the corporation were not bound to take into consideration their own contractual obligations: see *Board of Trade* v. *Temperley Shipping Co. Ld.* (4). The effect of giving two years' notice before the by-law came into force was that the contractors had two years in which to consider what the legal effect of the by-law would be. Accepting the view that the corporation are one and indivisible, it is submitted that *Board of Trade* v. *Temperley Shipping Co. Ld.* (4) is clearly against the view that a proper exercise by the corporation of their jurisdiction in relation to the making of by-laws could be regarded as a practical repudiation of the contract which they had made.

Harvey K.C. in reply.

LORD GODDARD C.J. The contract which the contractors seek to rescind has apparently turned out disastrously, or at any rate unfavourably, for them, and, not unnaturally, if they can find grounds for avoiding the burden of an unfavourable contract, they would desire to take advantage of them. Their case is that by the sealing of certain by-laws in April, 1948, which were confirmed by the Ministry of Health in July, 1948, and which were to come into operation on November 1, 1950, the corporation had, in effect, repudiated the contract. It is therefore necessary to consider the terms of the contract in some little detail.

[His Lordship read clauses 1, 12, and 13 of the contract and continued:] The by-laws which were in force at the time of the making of the agreement were made on April 8, 1897, and confirmed by the Local Government Board on May 21, 1897. Under those by-laws provision was made for the prevention of nuisance arising from the carriage of filth or other matter by

(4) (1926) 26 Ll. L. Rep. 76 (on appeal) (1927) 27 Ll. L. Rep. 230.

any ship, boat or vessel, but they did not provide that the vessels employed should have temporary coamings and coverings to be secured to the permanent coamings as provided in cl. 1 of the agreement of 1936. With regard to cl. 13, the only meaning I can give to it is that by its terms the contractors were not only required to observe and comply with the by-laws but at the same time they must comply with cl. 1 of the agreement, and it was made clear that the provisions of cl. 1 were to prevail notwithstanding that the by-laws which were then in force did not go so far as the provisions of the clause. It is not necessary for the purpose of my judgment to go through any more of the provisions of the contract except to say that cl. 24 concerns the case of a temporary interference with its performance as the result of such matters as the act of God, the acts of the King's enemies, or the regulations of any county council, parochial or local authority or by any government interference.

What has given rise to the contest in the present case is that in April, 1948, a by-law was made which, when it becomes effective in November of the present year, will throw a very considerable burden on barge-owners or lighter-owners who are engaged in this trade. [His Lordship read by-law 2 of April 29, 1948, and continued:] As I have said, that by-law was made in 1948 and, in substance, two years' notice was given of its provisions in order, I suppose, that lightermen might know what was in store for them and, if necessary, take steps to see that their vessels complied with the requirements of the by-law. The contractors have found that it will cost them between 450*l.* and 500*l.* for each barge to comply with those requirements.

It is not disputed, and the contrary has not been argued on behalf of the corporation, that when the by-law comes into force the agreement with the contractors will come to an end because it will be frustrated. As a business proposition it could not be expected that the contractors, out of the six shillings a ton which is all they receive under the agreement for the removal of the refuse, would be prepared to spend 450*l.* to 500*l.* on each barge to fit it to comply with the by-law. If they did not wish to expend that amount of money, they would be entitled to say that the terms of the agreement created by the by-law were so different from those which prevailed when the agreement was made that it was commercially impossible for them to carry on the contract. But the contractors wish to go further and say that, as the corporation in 1948 gave notice that the by-law was coming into force in 1950, that amounted to a repudiation of the agreement, because in that year the corporation were going to require them, if they were to continue to carry out the business, to alter their barges or lighters in such a way that it would be commercially impossible for them to continue. According to the contractors, that meant that the corporation were not going to allow them to carry out the contract in the way in which it was stated that it should be carried out when it was made.

The simple question which I have to decide has been accurately formulated by Mr. Williams as follows: did the act of the corporation in sealing the new by-law amount to a repudiation of the agreement which entitled the contractors to treat it as being determined on September 21, 1948? In my opinion it did not. In sealing the by-law the corporation were, no doubt, acting as a subordinate legislative authority, as all by-law-making authorities are. They were making a by-law of general application which would therefore apply, not only to the present contractors, but to all persons who were engaged, or might hereafter be engaged, in the trade or business of refuse removal or the other matters with which the by-law is concerned.

I do not think that it can be said that, because the port health authority are entrusted by Parliament with the duty of making by-laws with the object of securing the health of the port, and they think it right and necessary to pass a particular by-law, they are thereby repudiating a contract. It may be, as it happens in the present case, that the effect of the by-law will be to give the contractors the right to say that the contract will be frustrated in November of this year; but it does not seem to me that it amounted to a repudiation of the contract by the corporation in 1948. It was not an anticipatory breach of contract, for I do not think that the corporation were committing a breach of contract at all. The doctrine of anticipatory breach depends on one party's repudiating his obligation under a contract. If that occurs, the other party can, if he pleases, take advantage of it and say that he will treat the contract as at an end. But before there can be a repudiation there must be something in the nature of a wrongful act which may be either a breach of contract or the commission of a tort. In my opinion it is impossible to say in the present case that the corporation, acting as the port health authority, either broke their contract or committed a wrongful act because they imposed a by-law on the Port of London which will incidentally affect this particular contract.

According to the Oxford English Dictionary the words "to "repudiate" mean "to refuse to discharge or acknowledge a debt "or other obligation". In my view repudiation must be a conscious act in relation to the contract in question. That distinguishes it from the frustration of a contract, as was pointed out by Lord Sumner in *Hirji Mulji and Others* v. *Cheong Yue Steamship Co. Ld.* (5). There is no question in the present case whether the

(5) [1926] A. C. 497, 509.

corporation can be divided into two parts so that they are to be regarded qua sanitary authority as being one body, and qua the port health authority as another body. The corporation are one and indivisible, but they have distinct duties, and if one of their duties is to act as the port health authority, I cannot see that if, in that capacity, they make a by-law which is of general application and affects all persons on the River Thames, it can be said to be an act repudiating a contract entered into for another purpose altogether although, incidentally, it may affect it. It is not disputed that if some outside authority, for instance Parliament or the London County Council, or some other local authority, had made a by-law which would affect the contract, it would have some bearing on the question, though it could not amount to repudiation. As I have said, the repudiation with which the well-known doctrine of law is concerned must be a conscious act in relation to the particular contract which is said to have been repudiated.

All that happened in this case was that the corporation, in discharge of their duty as port health authority, legislated. That legislation will, no doubt, affect the present contract at the time when the legislation comes into force. It may well be, and I am willing to assume, that the effect of the by-law will be to frustrate the contract, and prevent its further application as being commercially impossible from the time when it becomes effective in November, 1950; but I cannot hold that what has happened here amounted to a repudiation. I therefore decide that the contractors were not entitled to treat the agreement as rescinded and of no effect after September 21, 1948, and the corporation will have the costs of this argument.

Judgment for the respondent corporation.

Solicitors: *E. F. Turner & Sons; Comptroller and City Solicitor.*

P. B. D.

1950
April 26.

Lord Goddard C.J., Morris and Finnemore JJ.

PRESTON *v.* FENNELL.

Food and drugs—Milk—Adulteration—Excess of water—Effect of analyst's certificate—Analyst not required by defence to be called—Evidence in explanation—Food and Drugs Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *s.* 81, *sub-s.* 1.

By s. 81, sub-s. 1, of the Food and Drugs Act, 1938: "In any "proceedings under this Act, the production by one of the parties "of a document purporting to be a certificate of a public analyst "in the prescribed form . . . shall be sufficient evidence of the "facts stated therein, unless, . . . the other party requires that "the analyst shall be called as a witness."

The effect of that sub-section is to render it unobjectionable that a public analyst's certificate should be put in as evidence of the facts which it states without the analyst's being called to give evidence in person; and accordingly the fact that he is not called does not preclude the calling of evidence by the defendant to contradict the certificate.

On the hearing of informations charging the defendant with having been "in possession for the purpose of sale for human "consumption milk to which an addition of water had been made, "contrary to s. 24 of the Food and Drugs Act, 1938", analysis of the samples of milk revealed the presence of excess water. The defendant did not require the analyst to be called as a witness, but called a veterinary surgeon who testified that the excess was referable to disease of the udder of one of the defendant's cows and to the effect of poor feeding the consequence of a shortage of fodder. The justices accepted that evidence, negatived the allegation of adulteration, and dismissed the informations. On appeal by the prosecutor:—

Held, that the justices were entitled to accept the expert evidence for the defendant notwithstanding the analyst's certificate, and notwithstanding that the analyst was not called to give evidence, and were entitled to dismiss the informations on that evidence.

Hewitt v. *Taylor* [1896] 1 Q. B. 287, applied: *Wade* v. *Beadle* (1948) 64 T. L. R. 498, distinguished.

Case stated by Warwickshire justices.

At a court of summary jurisdiction sitting at Coventry four informations were preferred by John Sidney Preston, the appellant, under s. 24 of the Food and Drugs Act, 1938, against Albert Charles Fennell, the respondent. Each information charged him with being in possession for the purpose of sale for human consumption of milk to which an addition of water had been made, contrary to s. 24 of the Act of 1938.

On the hearing of the informations the following facts were proved:—The prosecutor was at all material times an authorized officer of Warwickshire County Council as the local food authority

1950

PRESTON
v.
FENNELL.

under the Act of 1938. On September 25, 1949, and again on September 27, the defendant sold to the prosecutor three separate pints of milk. The milk in question was in each case obtained from cows of the same herd of not more than nine cows. One of the herd was, for the purpose of a process known as "drying off" before calving, for the period from September 24 to 28, 1949, milked only once each day, in the evening. The remaining cows were milked twice each day throughout the same period. The certificate of the public analyst (who was not called as a witness) showed that in each case the milk bought on September 25 and 27 showed the presence of added water in two of the pints, whereas the third pint was genuine milk. The sample taken on September 30 was by way of an "appeal to the cow" and was shown to contain genuine milk. A veterinary surgeon gave evidence for the defendant of the condition of health of the cows and on the effect, first, of deficiency of diet, and secondly of the disease of the udder known as mastitis, on the composition of the milk produced by the cows. The pasture on which all the cows were grazed at the material time was of poor quality owing to a period of drought. On account of the control of supplies of feeding stuffs, the quantity and nature of feeding stuffs which the defendant was able to obtain to supplement the grazing was insufficient to make up the deficiency in diet caused by the poor quality of the pasture. The deficiency in the diet of the cows tended to reduce the amount of "solids not fat" in their milk. On December 1, 1949, the cow being dried off before calving was suffering from mastitis. Her condition was, in the opinion of the veterinary surgeon, consistent with the fact that she was suffering from mastitis from September 24 to 26, 1949, and that condition would have affected adversely the quality of the milk taken from her by causing a coagulation of the solids other than fat.

It was contended for the prosecutor that the public analyst's certificates were sufficient evidence of the statements contained in them; and that the defendant could not rebut the evidence in them that there was added water in each sample by calling evidence that water had not in fact been added, unless the public analyst were required by the defendant to be called as a witness in accordance with s. 81, sub-ss. 1 and 3 of the Act of 1938.

It was contended for the defendant that the public analyst's certificates were merely prima facie evidence of the statements contained in them and that the evidence of the expert witness—to the effect that the probable loss of solids due to the presence of milk from a cow suffering from mastitis and the effect of the poor feeding of the cows were consistent with the deficiency certified in the case of the four samples in question without any addition of " extraneous water "—was sufficient to rebut the presumption that water had been added raised by the statement to that effect contained in each certificate.

The justices considered the provision in s. 81 of the Act of 1938 that " a document purporting to be a certificate of a public " analyst in the prescribed form . . . shall be sufficient evidence " of the facts stated therein, unless . . . the other party requires " that the analyst shall be called ", but were of opinion that it meant that, if the other party required the analyst to be called, the certificate would be inadmissible in evidence; but that if, as in the present case, there had been no such requirement, the certificate was admissible as prima facie evidence, and did not mean that, unless there were such a requirement, the certificate should be conclusive evidence.

They were accordingly of opinion that the evidence rebutting the presumption raised that water had been added to the milk could properly be considered by them.

In forming that opinion they were guided by the statement in the judgment of Slade J. in *Wade* v. *Beadle* (1) that " the " production of the analyst's certificate is prima facie evidence ". They accordingly considered that evidence and were of opinion that it was sufficient to rebut the presumption that water had been added in each of the four cases.

In coming to the conclusion that the veterinary surgeon's evidence was sufficient, they had regard to the fact that it was only in relation to the samples which they were satisfied from the evidence contained milk from the cow suffering from mastitis that the certificates of analysis purported to show the presence of added water. They were not satisfied from the evidence that the milk from that cow was included in the milk from which the appeal-to-cow sample was taken on September 30, 1949.

In coming to their conclusion they also had regard to the relatively small amount by which, in each case, the milk fell short of the minimum standard prescribed by the Sale of Milk Regulations, 1939, to the fact that in each case the amount of fat was substantially above that standard, and to the evidence given by the defendant that no water had in fact been added by him in the case of any of the samples.

Vernon Gattie for the prosecutor.
Rodger Winn for the defendant.

The arguments sufficiently appear from the contentions advanced before the justices.

LORD GODDARD C.J. In respect of each information laid here an analyst's certificate was produced; and in each case the analyst certified that the milk contained so much percentage of what he called "extraneous" water. If it had been necessary, which I do not think it is here, I should have been inclined to hold that by extraneous water the analyst meant added water; for he finds water there that ought not to be there, and how water could get into a churn unless it were put there, unless it were added to the milk, I do not know.

---

(1) (1948) 64 T. L. R. 498, 500.

The justices, having heard the evidence of a veterinary surgeon, as they were entitled to do, came to the conclusion that no water had been added. No application was made by the prosecution for an adjournment to enable them to call the analyst. It is argued, however, that the justices could not come to this decision because they were bound to find in favour of the analyst's certificate unless he were called to be cross-examined. I do not think that that is what s. 81, sub-s. 1, of the Food and Drugs Act, 1938, requires: the sub-section says that the certificate of the analyst "shall be sufficient evidence of the facts "stated therein, unless . . . the other party requires that the "analyst shall be called as a witness". In other words, either party may say that he does not accept the analysis, and proposes to show that there is more fat or less fat, or more water or less water in the milk than the analysis shows and that the analysis is incorrect. The sub-section does not say that the analyst's certificate is to be conclusive evidence. It is no objection to the analyst's certificate being put in as evidence of the facts which it states that the analyst is not called; and if the only evidence given is the analyst's certificate, the justices must act upon it and convict.

In *Hewitt* v. *Taylor* (2), however, a court presided over by no less an authority than Lindley L.J. rejected that line of argument where there was a conflict of evidence, that is to say, where the defendant called evidence which tended to contradict the evidence of the certificate. As Lindley L.J. said, "the "analyst could only say, as a fact, that there was an undue pro- "portion of water in the milk. That it had been added to the "milk could only be a matter of opinion; and it seems to me that "the respondent had the right to contradict it", and he did contradict it.

The statute there in question, the Sale of Food and Drugs Act, 1875, has been amended and re-enacted since then, and Parliament has not made any alteration in the relevant s. 21 in that case, save that in s. 81, sub-s. 1, of the Act of 1938 the provision in s. 21 of the Act of 1875 is omitted which provided that the defendant and his wife could give evidence. That provision was necessary then because the Criminal Evidence Act, 1898, had not yet been passed, after which the defendant and his wife were allowed to give evidence.

---

(2) [1896] 1 Q. B. 287, 289.

In *Wade* v. *Beadle* (3) the justices had before them an analyst's certificate which stated that water had been added to the milk. They then received evidence from the defendant farmer and his cowman who said that they had not added water to the milk—not that water had not been added, but that they had not added it. This court held that the justices were in those circumstances wrong in dismissing the summons, for the legislature had made it an offence for a person to have in his possession milk to which water had been added, and that it was not necessary to prove that the water had been added by the defendant. If that had been the issue in the present case, the justices would, of course, have been bound to accept the evidence of the analyst's certificate, subject to the question which Mr. Winn said that he might argue on the meaning of the word " extraneous ".

Apart from that, they would have been bound to accept the evidence of the analyst that water had been added; and if the defence had been " I did not add water ", then there would have been no conflict on the facts necessary to constitute the offence. Evidence was, however, led with a view to showing that water had not been added. The justices, having accepted that evidence and found that there was no added water in the milk, were entitled to come to their conclusion and dismiss the summonses. I think that this appeal fails.

MORRIS J. I agree.

FINNEMORE J. I agree. The contention was that, unless the respondent gave notice that he wanted the public analyst to be called as a witness, he could not produce any evidence to rebut what is contained in the certificate. That seems clearly contradictory of *Hewitt* v. *Taylor* (4). Section 81, sub-s. 1, of the Act of 1938 provides that the analyst's certificate is sufficient evidence by itself unless the other party gives notice that he wants the analyst called as a witness. It does not say that the certificate is conclusive evidence. It does not say that the respondent cannot call his own evidence and in fact disprove what is in the certificate. Here evidence was called to contradict the statement that water had been added at all, not to establish, as in *Wade* v. *Beadle* (5), that it had not been added by the farmer or one of his employees. The veterinary surgeon here gave

(3) 64 T. L. R. 498, 500.

(4) [1896] 1 Q. B. 287.

(5) 64 T. L. R. 498.

1950

PRESTON v. FENNELL.

Finnemore J.

evidence that the excess of water was due to deficiency in diet and to a disease known as mastitis. On that evidence the justices came to the conclusion that water had not been added, as they were entitled to do.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co., for R. M. Willis, deputy clerk to Warwickshire County Council; Callingham, Griffith & Bate, for Varley, Hibbs & Co., Coventry.*

L. F. J. McD.

JOHN M. BROWN LIMITED *v.* BESTWICK

[PLAINT NO. F. 2159]

C. A.

1950
June 16.

Evershed M.R., Cohen and Singleton L.JJ.

Landlord and tenant—Rent restriction—Lease of shop and dwelling-house—Determination of contractual tenancy—Tenant in possession of shop only—Dwelling-house sublet—Whether tenant protected—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15, *sub-s.* 1.

A shop and dwelling-house within the Rent Restriction Acts had been let together to a tenant for a term which expired on December 25, 1949. At that date the tenant was in occupation of the shop only, the dwelling-house being occupied by his sub-tenant. The landlord required the tenant to deliver up possession of the premises. The sub-tenant, after paying one week's rent to the landlord, left the dwelling-house. On February 7, 1950, the tenant re-took possession of the dwelling-house and went to live in it. On February 20, 1950, the landlord issued a plaint claiming possession and damages for trespass. The county court judge held that the tenant was entitled to the protection of the Rent Restriction Acts, since he was in possession of the whole of the demised premises when the plaint was issued. On appeal by the landlord:—

Held, that the tenant was not entitled to rely on the protection of s. 15, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, unless continuously in residential occupation of the premises; that, as, on December 26, 1949, when the contractual tenancy determined, he was no longer in possession of the dwelling-house, he ceased on that date to have any interest in the premises; that the fact that he again obtained possession of the dwelling-house before the issue of the plaint did not enable him to relate back his occupation of the whole premises to the date when the contractual tenancy determined and so revive the interest which he had lost; and that the landlord was therefore entitled to possession.

Haskins v. *Lewis* [1931] 2 K. B. 1, *per* Romer L.J., at p. 18, applied.

Prout v. *Hunter* [1924] 2 K. B. 736; *Leslie & Co.* v. *Cumming* [1926] 2 K. B. 417; and *Remon* v. *City of London Real Property Co. Ld.* [1921] 1 K. B. 49 distinguished.

APPEAL from His Honour Judge Willes, sitting at Derby and Long Eaton County Court.

By a lease dated December 9, 1935, No. 143 London Road, Derby, was demised to the respondent, John Bestwick, for a term of fourteen years, expiring on December 25, 1949, at a yearly rent of 60*l*. The premises were described in the lease as a shop and dwelling-house. The tenant had sublet the dwelling-house to a Mrs. Robinson at a weekly rent of 14*s*. On December 25, 1949, when the contractual tenancy came to an end, the tenant was in possession only of the shop. The appellants, John M. Brown Ld., who were, as landlords, entitled to the premises subject to the lease, wrote requiring the tenant to quit the premises and to make the sub-tenant deliver up possession of the dwelling-house.

On January 9, 1950, the sub-tenant paid one week's rent to the landlords. She subsequently gave them notice that she was vacating the dwelling-house. She did not, however, deliver possession to the landlords, and, when she left the premises on February 7, the tenant took possession of the dwelling-house and thereafter lived there with his wife and daughter. On February 22 the landlords issued the plaint in this action, claiming possession and damages for trespass.

The county court judge gave judgment for the tenant, holding that he was bound to look at the position when the plaint was issued. At that date, the tenant was in possession of the whole of the premises and accordingly, he held, the principle laid down in *Prout* v. *Hunter* (1) and *Leslie & Co.* v. *Cumming* (2) applied, and the tenant was entitled to the protection of the Rent Restriction Acts. The landlords appealed.

L. A. Blundell for the landlords. The question here is at what point of time the tenant has to show that he is entitled to protection under the Rent Restriction Acts. The choice lies between December 25, 1949, when the contractual tenancy determined, and February 22, 1950, when the plaint was issued. It is contended that, on the true construction of s. 15, sub-s. 1, of the Act of 1920 (3) a tenant is only entitled to claim to be a statutory tenant if at the determination of the contractual tenancy he is living in the demised premises: *Skinner* v. *Geary* (4). On December 25, 1949, the shop, which alone was occupied by the tenant, was not within the protection of the Acts. The dwelling-house was within the protection of the Acts and the sub-tenant was entitled to protection under sub-s. 3 of s. 15. Here the tenant did not " retain possession " within sub-s. 1. Section 15, sub-s. 1, does not give to a tenant a right to take possession of premises of which he was formerly a contractual tenant: it merely gives him a right to retain possession. [He referred to the observations of Scrutton L.J. in *Haskins* v. *Lewis* (5); and of Cohen L.J. in *Ellis & Sons Amalgamated Properties Ld.* v. *Sisman* (6).] The tenant must be in possession when the contractual tenancy determines. *Remon* v. *City of London Real Property Co. Ld.* (7) has no application to the present case. The question there was whether the premises were within the Acts at the date when the plaint was issued. Here the tenant was a trespasser after December 25, 1949, and he could not thereafter turn himself into a statutory tenant by retaking possession of the demised premises.

---

(1) [1924] 2 K. B. 736.

(2) [1926] 2 K. B. 417.

(3) The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15, sub-s. 1: "A tenant "who by virtue of the provisions of "this Act retains possession of any "dwelling-house to which this Act "applies shall, so long as he retains "possession, observe and be entitled

Megarry for the tenant. It is not disputed that, if at the determination of a contractual tenancy a landlord retakes possession of the demised premises, the tenant thereafter cannot claim the protection of the Acts. There was here one demise both of the dwelling-house and of the shop. The tenant throughout retained possession of the shop. His sub-tenant was in possession of the dwelling-house and, when the sub-tenant left, the tenant resumed possession of the entire premises before the plaint was issued. The test is the use of the premises at the date when the plaint was issued: *Prout* v. *Hunter* (8). It is submitted that, as the court has laid it down that the question whether premises are within the Acts has to be determined when the landlord seeks

---

" to the benefit of all the terms and " conditions of the original contract " of tenancy, so far as the same are " consistent with the provisions of " this Act, and shall be entitled to " give up possession of the dwelling-" house only on giving such notice as " would have been required under the " original contract of tenancy, or, if " no notice would have been so " required, on giving not less than " three months' notice . . . ."

Sub-section 3: " Where the " interest of a tenant of a dwelling " house to which this Act applies is " determined, either as the result of " an order or judgment for possession " or ejectment, or for any other " reason, any sub-tenant to whom " the premises or any part thereof " have been lawfully sublet shall, " subject to the provisions of this " Act, be deemed to become the " tenant of the landlord on the same " terms as he would have held from " the tenant if the tenancy had " continued."

(4) [1931] 2 K. B. 546.

(5) [1931] 2 K. B. 1, 13.

(6) [1948] 1 K. B. 653, 669.

(7) [1921] 1 K. B. 49.

(8) [1924] 2 K. B. 736.

possession (*Leslie & Co.* v. *Cumming* (9)), whether a tenant is entitled to protection must also be decided at that date: see *Remon* v. *City of London Real Property Co. Ld.* (10). *Hutchinson* v. *Jauncey* (11) shows that, if a tenant is in possession of premises within the scope of the Acts when the claim of the landlord to possession is heard, the tenant will not be deprived of possession.

COHEN L.J. This appeal raises what is said, and indeed rightly said, to be a short point: but, like most short points under the Rent Restriction Acts, it is not an easy one. [His Lordship stated the facts and continued:] The landlords contended that, as, at the date on which the lease expired, the tenant was not in possession or occupying any part of the premises as a dwelling-house, he never became a statutory tenant and could not claim to remain there under the Rent Restriction Acts. The tenant said that it was the duty of the county court judge to look at the position as it was on the date at which the plaint was issued, and that, as at that date, he, who had been the contractual tenant, was in occupation of the premises, he was entitled to remain there under s. 15, sub-s. 1, of the Act of 1920. He relied on *Prout* v. *Hunter* (12) and *Leslie & Co. Ld.* v. *Cumming* (13), as supporting that proposition, and the county court judge very reluctantly acceded to that submission.

From that decision the landlords appeal. They contend that the purpose of the Act is, as appears from *Skinner* v. *Geary* (14) and other cases, to protect residential tenancies, and that the tenant, in order to retain possession within the meaning of s. 15, must reside on the premises. I do not propose to refer to all the cases to which Mr. Blundell called our attention. I think it sufficient to refer to *Haskins* v. *Lewis* (15). The premises consisted of a basement, ground floor, first floor and second floor. The tenant originally carried on a tailor's business in the shop which was on the ground floor and resided in the house with his family. He ceased to carry on the tailor's business, his daughter carried on a drapery business on the ground floor, and his son carried on a betting business on the first floor. The tenant later removed to another house and sub-let two rooms in the basement to one sub-tenant and two rooms on the second floor to another sub-tenant, in each case as a residence. The landlord then served notice to quit upon the tenant, and instituted proceedings for possession. The tenant sought to rely upon the protection given by the Rent Restriction Acts, and the county court judge found as a fact that the ground floor and the first floor constituted business premises, and that the tenant had sublet the remainder of the premises and so parted with possession of them. The Court of Appeal decided by a majority, Scrutton and Romer L.JJ., Greer L.J. dubitante, "that an order could be made for the "recovery by the landlord of possession of the whole of the "premises, notwithstanding that the basement and second floor "had been sublet to two tenants as residences, those sub-tenants "being protected by s. 5, sub-s. 5, and s. 15, sub-s. 3, of the "Rent Restriction Act, 1920."

---

(9) [1926] 2 K. B. 417.
(10) [1921] 1 K. B. 49.
(11) [1950] 1 K. B. 574.
(12) [1924] 2 K. B. 736.
(13) [1926] 2 K. B. 417.
(14) [1931] 2 K. B. 546.
(15) [1931] 2 K. B. 1.

The ratio decidendi on which Scrutton and Romer L.JJ. proceeded is, I think, most clearly stated in this passage from the judgment of Romer L.J. (16): "If it be right, as I think "it is, to say that a tenant, who has given up possession of the "whole of the premises, or who has sublet the whole of the "premises, is not entitled to the protection of the Act when his "contractual tenancy comes to an end, it is equally true that "where the contractual tenancy has come to an end and the "tenant has given up possession of the residential portion of the "premises and only remains in possession of part of the premises "used solely for business purposes he is outside the protection "afforded by the Act."

That passage (which, as I have said, is the ratio decidendi of the decision in *Haskins* v. *Lewis* (16)) prima facie covers in terms the facts of the present case. But Mr. Megarry pointed out that the mind of the court was not directed to what the position would have been if, as here, a tenant who had given up possession of the residential portion of the premises had recovered possession of them, no matter how, before proceedings were brought by the landlord to recover possession. He says that the principle laid down by the Divisional Court in *Leslie & Co. Ld.* v. *Cummings* (17), the case relied on by the county court judge, applies. He said that there would be the utmost inconvenience if a different test were to be applied in deciding whether or not premises were within the Act, on the one hand, and in deciding the connected question whether or not the defendant was a statutory tenant of those premises on the other.

It is quite clear, I think, from the cases that were cited that it has been held that, in determining whether or not a house is a dwelling-house to which the Rent Restriction Acts apply, regard must be had to the position at the moment of time when the plaint is issued. But it does not seem to me necessarily to follow from that that the same date must be regarded in deciding whether or not the occupier can properly claim to be a tenant of those premises, either as contractual tenant or as statutory tenant. That conclusion would, I think, be inconsistent with s. 15 of the Act of 1920. Section 15, sub-s. 1, provides that: "A "tenant who by virtue of the provisions of this Act retains "possession of any dwelling-house to which this Act applies shall, "so long as he retains possession, observe and be entitled to the "benefit of all the terms and conditions of the original contract "of tenancy," and so on. It seems to me an essential ingredient that the tenant should retain possession continuously of the dwelling-house. In saying that I am not, of course, ignoring that in some cases he might retain possession although he was not in personal occupation: for instance, if he were a sailor at sea, he might retain it by the presence of his wife and furniture on the premises; or, again, he would retain it if he ceased to occupy the premises temporarily owing to ill-health, as in one case cited by Mr. Megarry. Apart from such exceptional cases, where the intention to return is fully established, it seems to me that the tenant is not entitled to rely on the protection of s. 15, sub-s. 1, unless he is continuously in residential occupation of the premises. I think, further, that that conclusion is reinforced, as Mr. Blundell submitted, by s. 15, sub-s. 3, which provides: "Where "the interest of a tenant of a dwelling-house to which this Act "applies is determined, either as the result of an order or judg-"ment for possession or ejectment, or for any other reason, any "sub-tenant to whom the premises or any part thereof have been "lawfully sublet shall, subject to the provisions of this Act, be "deemed to become the tenant of the landlord on the same terms "as he would have held from the tenant if the tenancy had "continued."

---

(16) [1931] 2 K. B. 1, 18–19. (17) [1926] 2 K. B. 417.

On the facts of this case, the sub-tenant would clearly become the tenant of the landlords if the condition prescribed at the beginning of sub-s. 3 had been established and the interest of the tenant had been determined. That his contractual interest had determined is, of course, beyond argument. But Mr. Megarry sought to induce us to hold that his interest as a statutory tenant had not determined—that he retained some interest as a statutory tenant. On December 26, 1949, it is plain, he was in occupation of no residential part of the premises: he was in occupation only of the shop. In those circumstances, it seems to me that we should be applying the Act for a purpose for which it was plainly not intended if we were to hold that the occupation of business premises which are not protected by the Act was sufficient to preserve an interest for the tenant in the premises and prevent s. 15, sub-s. 3, from operating. It seems to me that on December 26, 1949, the tenant ceased to have any interest in the premises. I do not think that the interest can be revived by the fact that he obtained from his former sub-tenant—I say "former" because she had ceased to be his sub-tenant on December 26, 1949—possession of the premises on February 7, 1950.

Mr. Megarry suggested that so to hold was inconsistent with the decision of this court in *Remon* v. *City of London Real Property Co. Ld.* (18). In that case, however, the question at issue was different: it was whether a defendant, who had admittedly remained in possession of business premises continuously from the time when his contractual tenancy had come to an end, could rely on an Act which did not come into force until after the determination of his contractual tenancy and which afforded protection to sub-tenants. The Court of Appeal in that case held that he could. Bankes L.J. said (19): "It is however clear "that in all the Rent Restriction Acts the expression 'tenant' "has been used in a special, a peculiar sense, and as including a "person who might be described as an ex-tenant, someone whose "occupation had commenced as tenant and who had continued "in occupation without any legal right to do so except possibly "such as the Acts themselves conferred upon him."

This court had to consider the effect of that case in *Hutchinson* v. *Jauncey* (20). Evershed M.R. there said, in the course of his judgment, that *Remon's* case (21) showed that, in determining the question whether or not the tenant was entitled to possession, the court must have regard to the law as it was at the time when the court was deciding the matter. It is manifest that, having regard to the various questions which arise under the Acts in relation to different subject-matters, different dates may be material. I do not think that there is anything in *Remon's* case (21) which touches the question which we are now determining. I would add, too, that *Remon's* case (21) seems to me to depend upon the continued occupation of the premises by the tenant. In the present case there was no such continued occupation, and I cannot see any answer to Mr. Blundell's point that on December 26, 1949, the tenant's contractual tenancy had come to an end and there was no statutory tenancy since at that time he was not in occupation of any part of the premises as a residence. It seems to me that if we were to come to a contrary conclusion we should be using Acts, which were intended to protect residential tenancies, for the purpose of protecting business tenancies which are outside the Acts.

For these reasons I have come to the conclusion that we can accede to the request which the county court judge made at the end of his judgment, when he said that he sincerely hoped that on appeal his decision might be found to be erroneous. I would allow the appeal.

---

(18) [1921] 1 K. B. 49.
(19) Ibid. 54.
(20) [1950] 1 K. B. 574.
(21) [1921] 1 K. B. 49.

EVERSHED M.R. I agree. By arriving at this conclusion we have gratified the wish of the county court judge expressed at the end of his judgment, and for that reason (though I take a different view from that which he felt compelled to entertain) I shall add but few observations to the reasoning of Cohen L.J., with which I agree.

The tenant has sought to establish a legal right under this somewhat complex legislation to the continued occupation of the premises on part of which he has for many years carried on his business. The question is, whether, in the circumstances, he is entitled to remain. Mr. Megarry said that he would be in much greater difficulty if, during the interregnum between Christmas, 1949, and the re-entry into possession by his client in February, 1950, he had been in occupation of no part of the premises. Mr. Megarry did not concede that in those circumstances he must have failed, but he did agree that his case would be more difficult. I think on that hypothesis that he would have failed, for the simple reason that he could not then say that he was a tenant who had " retained possession " of a dwelling-house. On the facts, and this has, I think, been put by Mr. Megarry as the foundation of his case, his client did retain possession of, and did continue to occupy, that part of the premises which was used for business purposes. By so doing, it is argued, when he came to occupy again the residential part, the latter occupation was, so to speak, fed by the continued occupation of the business part which enabled the tenant to relate back his occupation of the whole after February 7, to the original contractual tenancy, on the ground that there was originally one demise only of the composite premises. In my judgment the distinction does not prevail. The tenant is unable to show that he was occupying anything as a dwelling-house during what I have called the interregnum, and therefore the necessary nexus was broken and the necessary condition for the bringing into existence of a statutory tenancy in the tenant was destroyed. I think that, as my brother has stated, the fact that the sub-tenant acquired a statutory tenancy of the residential part is a further and grave obstacle in the tenant's way; for his own alleged statutory tenancy quoad the residential part is, so to speak, separated from its contractual parent by a statutory tenancy in another, to which the tenant's statutory tenancy is not alleged to bear any relation. It is quite true that in *Haskins* v. *Lewis* (22) the point which we have to determine was not before the court. I agree, however, that the

---

(22) [1931] 2 K. B. 1.

C. A.

1950

John M. Brown Ld.
v.
Bestwick.

Evershed M.R.

passage which Cohen L.J. has cited from Romer L.J.'s judgment as a matter of principle covers the present case, and I therefore follow it. As regards *Remon's* case (23), I can add nothing to what Cohen L.J. has said by way of grounds for thinking that in this case it has no application. The essential condition of occupation of the dwelling-house as such was not satisfied until February, 1950, and I think that by that time the chain was broken. I think that this appeal should be allowed.

Singleton L.J. I agree.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co. for Taylor, Simpson & Mosley, Derby; G. A. Hathway for Flint, Bishop & Barnett, Derby.*

B. A. B.

---

(23) [1921] 1 K. B. 49.

REX *v.* HEYES.

C. C. A.

1950
July 17.

Lord Goddard C.J., Hilbery and Byrne JJ.

Criminal law—Plea of not guilty—Plea of guilty substituted after accused man put in charge of jury—Jury not asked to return a verdict—Trial a nullity.

A prisoner in the charge of the jury can only be either convicted or discharged by the verdict of the jury.

The appellant pleaded not guilty to charges of stealing and receiving certain property, but, during the opening of the case for the prosecution he altered his plea to one of guilty of receiving. The jury were not asked to return a verdict.

Held, that the trial was a nullity to such an extent that the court could set aside the proceedings and order a retrial; but that, in view of the appellant's good character, the court would merely quash the conviction.

Appeal against conviction.

The appellant, Percy Heyes, was charged before the Recorder of Bolton with stealing some bicycles, or, in the alternative, with receiving them. At his trial he at first pleaded not guilty, but during the opening of the case for the prosecution he asked for legal aid and was allotted counsel, who told the court that the appellant wished to withdraw his original plea and to plead guilty

[Reported by Miss Sheila Cobon, Barrister-at-Law.]

to the charge of receiving. The appellant in fact did so, but the jury were not asked to return a verdict.

C. E. Goolden for the appellant.
P. J. Corcoran for the Crown.

Lord Goddard C.J. [after stating the facts]:—It is not enough for counsel to make a statement that his client wishes to withdraw his plea of not guilty and to substitute one of guilty: the prisoner himself must plead. However, both counsel in this case agree that the appellant did himself plead. Once the jury had heard the appellant say that he wished to withdraw his plea and admit his guilt, the proper proceeding was for the court to ask them to return a verdict. It appears that counsel did suggest to the learned recorder that this was the proper course; but the recorder thought that it did not matter. It does matter, because, once a prisoner is in charge of a jury, he can only be either convicted or discharged by the verdict of the jury.

As there was no verdict of the jury here, the trial was a nullity to such an extent that the court could set aside the proceedings and order a retrial or venire de novo. We are not going to take that course here, but will merely quash the conviction. The appellant is a man of good character, there is no previous conviction against him, and he has already been awaiting this appeal for two months. There is no fault of counsel in this case on either side.

Conviction quashed.

Solicitors: *The Registrar, Court of Criminal Appeal; Edgar Fielding, Bolton.*

GARNER *v.* BURR AND OTHERS.

1950
July 21.

Lord Goddard C.J., Hilbery and Byrne JJ.

Road traffic—Tractor towing empty poultry shed on iron wheels—Failure to comply with regulations as to construction, weight and equipment—Whether poultry shed a trailer—"Land implement"—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 1; *s.* 3, *sub-ss.* 1 *and* 3*—Motor Vehicles (Construction and Use) Regulations (St. R. & O.,* 1947, *No.* 670), *regs.* 3, 49, 50, 51 *and* 60.

The Road Traffic Act, 1930, s. 1, provides that the Act shall apply to all mechanically propelled vehicles intended or adapted for use on roads (in the Act called motor vehicles) and to vehicles (in the Act called trailers) drawn by motor vehicles.

By s. 3, sub-s. 1 ". . . it shall not be lawful to use on any road a . . . trailer which does not comply with the regulations applicable to the class or description of vehicles to which the vehicle belongs, as to the construction, weight and equipment thereof".

An empty poultry shed fitted with iron bogie wheels was drawn along the highway by a tractor for sale at the market. The tractor driver was charged under ss. 1 and 3 of the Road Traffic Act, 1930, with using a trailer which did not comply with the Motor Vehicles (Construction and Use) Regulations, 1947, in respect of construction, weight and equipment.

Held, that, as s. 1 of the Act was aimed at anything capable of running on wheels which was drawn by a motor vehicle, the poultry shed was a trailer, and that, as it did not comply with the regulations, an offence had been committed; for it was not exempt from those regulations since it was not a "land implement" within the definition in reg. 3 (1).

CASE STATED by Norfolk justices.

An information was preferred by the prosecutor against the first defendant, Lawrence Godfrey Burr, under the Road Traffic Act, 1930, alleging that on March 5, 1950, on a road at Aylsham, Norfolk, he used a trailer which did not comply with the regulations applicable to the class or description of vehicles to which the vehicle belonged, concerning construction, weight and equipment, contrary to s. 3, sub-ss. 1 and 3, of the Act. An information was also preferred against the second defendant, Edmund Burr, for permitting the offence contrary to s. 3, sub-ss. 1 and 3, of the Road Traffic Act, 1930; and a further information was preferred against the third defendant, Thomas Atlee Grix, for aiding and abetting Lawrence Godfrey Burr to commit the offence charged in the first information, contrary to s. 5 of the Summary Jurisdiction Act, 1848.

At the hearing of the informations the following facts were proved or admitted:—On March 5, 1950, the first defendant, accompanied by the third and with the consent of the second

[Reported by Miss SHEILA COBON, Barrister-at-Law.]

defendant, drove along the road a Ferguson tractor which was towing an empty poultry shed fitted with and drawn on four ordinary iron bogie wheels 10 to 12 inches in diameter. The tractor was the property of the second defendant, and the poultry shed, which belonged to the third defendant, was being towed to Aylsham to be sold. The tractor was a land tractor as defined by reg. 3 (1) of the Motor Vehicles (Construction and Use) Regulations, 1947. The overall width of the poultry shed as defined by reg. 3 (1) was 8 feet 10 inches; it had no brakes or braking system; it was not equipped with pneumatic tyres or tyres of soft or elastic material; and there was not exhibited on its back a distinguishing mark in the form required by the regulations.

It was contended for the prosecutor that the poultry shed was a trailer within the meaning of s. 1 of the Act of 1930 (1); that it was not a land implement within the meaning of reg. 3 (1) of the regulations; and that it did not comply with regs. 49, 50, 51 and 60 of the Regulations of 1947.

It was contended for the defendants that the poultry shed was a land implement within the meaning of reg. 3 (1) and that it was not a trailer within the meaning of s. 1 of the Act of 1930.

The justices, being of the opinion that s. 3, sub-ss. 1 and 3, of the Act of 1930 concerned " motor vehicles " and " trailers " and that " trailers " were defined by s. 1 of the Act as " vehicles " drawn by motor vehicles ", held that the poultry shed was not a vehicle because it was not an instrument or thing by which persons or goods were conveyed and so did not fall within the definition of " trailer " contained in s. 1 of the Act. They further considered that, even if the poultry shed were a vehicle, it was a land implement and therefore excluded from the requirements of regs. 49, 50, 51 and 60. They accordingly found the defendants not guilty of the offences charged.

The prosecutor appealed.

Southall for the prosecutor.

The defendants did not appear and were not represented.

---

(1) Road Traffic Act, 1930, s. 1: " This part of this Act shall apply to " all mechanically propelled vehicles " intended or adapted for use on roads " (in this Act referred to as ' motor " ' vehicles ') and to vehicles (in this " Act referred to as ' trailers ') drawn " by motor vehicles."

Section 3, sub-s. 1: " . . . it shall " not be lawful, to use on any road " a motor vehicle or trailer which does " not comply with the regulations " applicable to the class or description of vehicles to which the vehicle " belongs, as to the construction, " weight and equipment thereof ".

Sub-s. 3: " If a . . . trailer is used " on a road in contravention of this " section, any person who so uses the " vehicle or causes or permits the " vehicle to be so used shall be guilty " of an offence ".

Lord Goddard, C.J. The short point is whether an empty poultry shed fitted with iron bogie wheels is a trailer. If it is, there is no doubt that the offence charged has been committed, because it did not comply with the Motor Vehicles (Construction and Use) Regulations, 1947, which regulate, among other things, the use of trailers on a highway. The regulations are designed for a variety of reasons, among them the protection of road surfaces; and, as this vehicle had ordinary iron tyres, not pneumatic tyres, it was liable to damage the roads.

The justices have put what is in my opinion too narrow an interpretation on the word " vehicle " for the purposes of this Act. It is true that, according to the dictionary definition, a " vehicle " is primarily to be regarded as a means of conveyance provided with wheels or runners and used for the carriage of persons or goods; and also a receptacle in which anything is placed in order to be moved. It is true that the justices do not find that anything was carried in the vehicle at the time; but I think that the Act is clearly aimed at anything which will run on wheels which is being drawn by a tractor or another motor vehicle. Accordingly, an offence was committed here. The regulations in question clearly cover many vehicles which are not designed for the carriage of goods or passengers. They cover drying or mixing plant for the production of asphalt, and a vehicle for the purpose of road construction. Many things are trailers for the purposes of this Act, and I do not think that it can really be doubted that a trailer for those purposes includes anything which can be drawn on wheels. It follows that the justices ought to have found that this poultry shed was a vehicle within the meaning of s. 1 of the Road Traffic Act of 1930.

Reg. 3 (1) (ii) (*b*) excepts from the requirements of the regulations a land implement, which is defined as " any implement or " machinery used with a land locomotive or a land tractor in " connexion with agriculture, grass cutting, forestry, land " levelling, dredging or similar operations and includes a living " van and any trailer which for the time being carries only the " necessary gear or equipment of the land locomotive or land " tractor which draws it ". This shed is not an implement or machinery used in connexion with agriculture, and is not a land implement within the meaning of that definition, which is designed to cover such things as reapers or binders, or rakes and harrows which are in daily use on a farm.

For these reasons I think that the justices were wrong, and the case must go back with an intimation that the offence was proved. At the same time the justices can regard this as a case brought to establish a principle. The question of penalty, or whether they should inflict a penalty at all, is entirely for them: they have an unfettered discretion.

Hilbery, J. I agree. Having regard to the purpose of the Act to which my lord has called attention, I am satisfied that we ought to give a generous construction to the material words in the Road Traffic Act, 1930. I am satisfied that, for the purposes of the Act, this poultry house on wheels being drawn along the highway was a vehicle.

With regard to the finding of the justices that it could be regarded as a land implement, I think the matter too plain for words: it could not possibly be a land implement within the definition in reg. 3 (1) of the Motor Vehicles (Construction and Use) Regulations, 1947. I agree that the case must go back for conviction.

Byrne, J. I agree.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co. for H. O. Brown, Norwich.*

1950
July 14, 15, 21.

Lord Goddard C.J., Hilbery and Byrne JJ.

KAT *v.* DIMENT

Merchandise marks—Applying false trade description to goods—"Non-brewed Vinegar"—Acting without intent to defraud—Sale of goods bearing false trade description—Vendor acting "innocently"—Merchandise Marks Act, 1887 (50 *&* 51 *Vict. c.* 28), *s.* 2, *sub-ss.* 1 *and* 2.

By s. 2, sub-s. 1 of the Merchandise Marks Act, 1887, "Every "person who— . . . (*d*) applies any false trade description to goods ". . . shall . . . unless he proves that he acted without intent to "defraud, be guilty of an offence against this Act".

By sub-s. 2, "Every person who sells . . . any goods . . . to which "any . . . false trade description is applied" shall be guilty of an offence unless he proves that he has taken all reasonable precautions against committing an offence against the Act "or that otherwise he "acted innocently."

Except in the case of goods to which s. 18 of the Act applies, if a false trade description is in fact intentionally applied to goods, an offence is committed under s. 2, sub-s. 1, notwithstanding that that description is known to, and commonly used by, persons dealing in those goods and that its use has been sanctioned by official authority.

In the case of each of the offences created by the two sub-sections of s. 2, the intentional doing of the prohibited act supplies the mens rea necessary to constitute the offence; and the defence that the act in question was done without intent to defraud, or that the person charged acted innocently, is only available if it be established that the act was done by mistake or accident.

CASE STATED by the chief metropolitan magistrate.

An information was preferred by Ivy Christian Diment against the defendant, Joseph Kat, under s. 2, sub-s. 1, (*d*), of the Merchandise Marks Act, 1887 (1), for that he did unlawfully apply a false trade description to goods, namely, the false description "non-brewed vinegar" to bottles of liquid.

On the hearing of the information the following facts were proved or admitted:—The defendant carried on business as the Premier Pickle Co. and sold the bottles which were the subject of the information knowing that they were labelled "non-brewed "vinegar". The liquid contained in the bottles was a solution of acetic acid and caramel and contained between 4 and 6 per cent. of pure acetic acid coloured with caramel. Such liquid had been sold on a large scale as a condiment and as a preservative for food since about 1890. It was originally sold, and was generally known, by the name of "wood vinegar", later as "table vinegar" and in 1937 it was re-named "non-brewed "vinegar", by which name it had since been described substantially to the exclusion of all others. The quantity of the liquid sold under the name of "non-brewed vinegar" amounted to several million gallons a year, representing three-eighths or more of the quantities of malt vinegar sold. When properly prepared, "non-brewed vinegar" was wholesome and suitable for use for the same purposes as vinegar.

Although extremely similar, vinegar produced by fermentation was different from the synthetic variety. The fermented liquor was produced by a process of double fermentation in the course of which a solution of acetic acid was naturally formed in the liquid together with certain secondary products of fermentation which gave the liquid a smoothness and a characteristic bouquet and aroma superior to those possessed by " non-brewed vinegar ". When used alone, the term " vinegar " was understood by those in the trade to mean malt vinegar and the term " non-brewed " vinegar " was understood and accepted by the trade (including those in the retail trade selling to members of the public) to mean such a liquid as that sold by the defendant and the term had been used by the Ministry of Food as an official description of the liquid in question.

---

(1) Merchandise Marks Act, 1887, s. 2, sub-s. 1: "Every person who— ". . . (*d*) applies any false trade "description to goods . . . shall, "subject to the provisions of this Act, "and unless he proves that he acted "without intent to defraud, be "guilty of an offence against this "Act."

Sub-s. 2: "Every person who "sells, or exposes for, or has in his "possession for, sale . . . any goods ". . . to which any . . . false trade "description is applied . . . shall, "unless he proves—(*a*) That having "taken all reasonable precautions "against committing an offence "against this Act, he had at "the time of the commission of "the alleged offence no reason to "suspect the genuineness of the ". . . trade description; and (*b*) "That on demand made by or on "behalf of the prosecutor, he gave "all the information in his power "with respect to the persons from "whom he obtained such goods or "things; or (*c*) That otherwise he "had acted innocently; be guilty of "an offence against this Act."

Some 450 manufacturers of the liquid (including the defendant) had been licensed by the Ministry to engage in its manufacture. The manufacturers had been required to submit returns of their production of the liquid and had also been instructed as to the form of label to be used thereon, the term " non-brewed vinegar " being used throughout. Labels bearing that term, including those used by the defendant, had been submitted to, and approved by the Ministry.

The chief magistrate was satisfied on the evidence before him that " vinegar " could only consist of a product of double fermentation and that the liquor sold as " non-brewed vinegar ", was not vinegar. He was of opinion that the term " non-brewed " vinegar " consisted of " vinegar " as the genus and " non- " brewed " as the species and consequently (the defendant's product not being " vinegar " and vinegar, therefore, being a false trade description thereof) " non-brewed vinegar " must be a false trade description. He accepted the contention for the prosecutor that the defendant having intentionally applied to his product a description which was in fact a false trade description, had applied it with intent to defraud within the meaning of the Act and he accordingly convicted the defendant who appealed.

Drewe K.C. and *Kenneth Johnston* for the defendant. It is conceded that the liquid with which the present case is concerned was not vinegar; but the phrase " non-brewed vinegar " is always understood to mean the kind of liquid which the defendant produced and therefore it is not a false trade description. Whether a description is scientifically correct is irrelevant, it is the description which is understood and accepted by the trade which must be used. It is no defence that a description is scientifically correct if it is inappropriate by trade user (*Fowler* v. *Cripps* (2)). Conversely, a description sanctified by trade usage satisfies the statute notwithstanding that, scientifically, it is

(2) [1906] 1 K. B. 16.

inaccurate. "Non-alcoholic wine" and "ginger beer" are not false trade descriptions.

[LORD GODDARD, C.J. But in those cases s. 18 of the Merchandise Marks Act, 1887 (3), operates. That section shows that the fact that a description is recognized in the trade is only a defence if it was so recognized at the time when the Act was passed in 1887. That provision is not, therefore, applicable in the present case.]

Lemy v. *Watson* (4), which was referred to in the court below, only decided that in that particular instance the case was not covered by s. 18, and it affords no assistance in the present case. *Holmes* v. *Pipers Ld.* (5), was relied on by the chief magistrate, but in that case (in which a product was described as "Fine British Tarragona Wine") the epithet did not go to show how the product was made. It is conceded that in the present case the liquid could not properly be described as vinegar; but that is no reason why it should not be sold as "non-"brewed vinegar".

There was no intent to defraud in this case and to constitute an offence under the section there must be an intention to mislead the public (see *Allard* v. *Selfridge & Co. Ld.* (6)) and such an intent cannot be found if the customer only buys what he was intending to buy: see *Starey* v. *Chilworth Gunpowder Co.* (7). In the present case the defendant sold the liquid under the name by which it was known in the trade, honestly believing that "non-brewed vinegar" was its correct name. That negatives a dishonest intention on his part and the chief magistrate was wrong in finding that he had committed the offence with which he was charged.

Sir David Maxwell Fyfe K.C. and *Vernon Gattie* for the prosecutor were only called on to address the court on the question of intent to defraud. Whether a person has an intent to defraud depends entirely on whether he does intentionally an act which is in contravention of the statute. Here the defendant sold as vinegar, and intended so to sell, something which was not vinegar and he was not entitled to say, "I thought I was "entitled to sell it as vinegar". *Wood* v. *Burgess* (8), shows that an intent to defraud purchasers is not a necessary ingredient

(3) Merchandise Marks Act, 1887, s. 18: "Where, at the passing of "this Act, a trade description is law- "fully . . . applied to goods of a "particular class, or manufactured "by a particular method, to indicate "the particular class or method of "manufacture of such goods, the pro- "visions of this Act with respect to "false trade descriptions shall not "apply to such trade description "when so applied . . .".

(4) [1915] 3 K. B. 731.

(5) [1914] 1 K. B. 57.

(6) [1925] 1 K. B. 129.

(7) (1889) 24 Q. B. D. 90.

(8) (1889) 24 Q. B. D. 162.

of the offences under s. 2. In the argument for the appellant in that case it was submitted that the object of the Merchandise Marks Act, 1887, is to protect the owner of a trade mark and not the purchaser of the article. [Lord Goddard C.J. In sub-s. 2 of s. 2, there is nothing about intent to defraud. The words are "acted innocently".] In *Stone* v. *Burn* (9), Lord Coleridge J., quoting Channell J. in *Christie Manson & Woods* v. *Cooper* (10), said that the "innocence" contemplated by sub-s. 2, was innocence of any intention to infringe the Act. If the act charged is done intentionally there is an intent to defraud within the meaning of sub-s. 1, and an absence of innocence under sub-s. 2.

Drewe K.C. in reply. "Defraud" in s. 2, sub-s. 1, must bear its usual and real meaning. There was no intent to defraud in the present case. In using the words "non-brewed" before vinegar, the defendant was acting strictly in accordance with the practice which had prevailed for a number of years under government authority, and was using words which he thought he was entitled to employ. [Lord Goddard, C.J. He was selling as vinegar what he knew was not vinegar. That was an offence.] In no ordinary sense of the word was any intent to defraud proved before the magistrate. The defendant was using words which he thought negatived any such an intent on his part. [Lord Goddard, C.J. If the defendant had described the liquid as "imitation vinegar" that would have been a different matter, but what he said was that it was "vinegar".]

Cur. adv. vult.

July 21. LORD GODDARD, C.J., read the following judgment:—The magistrate convicted the defendant, holding that a false trade description was applied to the goods, and rejecting the defendant's contention that he acted without intent to defraud. It will be necessary to consider the two points separately.

[His Lordship stated the facts and continued:—] On the first point, the magistrate has found that vinegar is fermented liquor made by a process of double fermentation, in consequence of which a solution of acetic acid is naturally formed in the liquid. The real difference between the two liquids is that what is sold as "non-brewed vinegar" is a synthetic product, while true vinegar, as the magistrate has found, is the result of natural fermentation. It should be stated that he finds that the term "non-brewed vinegar" is understood and accepted in the trade to mean a liquid such as is prepared and sold by the defendant. It has been recognized by the Ministry of Food; but the magistrate found that vinegar is the product of double fermentation and that the liquor sold as non-brewed vinegar is not vinegar at all, but merely a solution of acetic acid; and that, as it was not vinegar, to describe it as such, although with the addition of the words "non-brewed", was to apply a false trade description.

---

(9) [1911] 1 K. B. 927.

(10) [1900] 2 Q. B. 522.

There was clearly evidence upon which the magistrate could come to that conclusion, and we cannot review his findings of fact, though I do not wish to throw any doubt on his finding. In view of that finding, which, as I have said, there was evidence to support, it is quite impossible to say that the magistrate was wrong in holding that a false trade description had been applied to the goods. The fact that this description may be known to the trade and be commonly used by them or may be known to the Ministry is, in my opinion, quite immaterial. If the description is false, it matters not whether other people use it or how generally it may be used, unless it is proved that this description was lawfully and generally applied to those goods at the date of the passing of the Merchandise Marks Act, which was August 23, 1887.

[His Lordship read s. 18 of that Act and continued:—] The meaning of that section is clear, and is that, if at the time of the passing of the Act it was common in the trade to apply a particular description, although it was false, to certain goods, that description could still be used after the passing of the Act; but it also clearly shows that it will be no defence thereafter that a description is commonly used in the trade if in fact it is false. I am therefore of opinion that the magistrate was entitled to find here that a false trade description had been applied to the goods in question.

The second point raised in the case is perhaps more difficult. Section 2, sub-s. 1, which creates the offence in question, provides that: "Every person who— . . . (*d*) applies any false trade "description to goods . . . shall, subject to the provisions of "this Act, and unless he proves that he acted without intent "to defraud, be guilty of an offence against this Act". In view of the authorities which have been cited to us and the reasons which the magistrate gave for his decision, it is necessary also to refer to sub-s. 2. That sub-section concerns persons who sell or have in their possession goods to which any false trade description has been applied, and is obviously contemplating, among other people, a retailer who may have bought goods to which a false trade description has been applied. The retailer is given the opportunity of proving by way of defence that he had taken all reasonable precautions against committing an offence against the Act; that he had no reason to suspect the genuineness of the trade description; and that on demand made by the prosecutor he gave all the information in his power with respect to the persons from whom he obtained the goods, or that otherwise he had acted innocently.

The magistrate rejected the contention that the defendant here had acted without intent to defraud, on the authority of *Allard* v. *Selfridge & Co. Ld.* (11), a prosecution brought under sub-s. 2. He said that he thought that there was no distinction to be drawn between the two sub-sections in respect of the onus laid upon the defendant, and he relied particularly on the passage in Shearman J.'s judgment, where he said: "I think the "plain meaning of this statute is that guilt or innocence is "determined by the answer to the question whether intentionally "an act has been done which is contrary to the words of the "statute".

The only reported case in which the words "without intent to "defraud" in sub-s. 1 were considered is *Starey* v. *Chilworth Gunpowder Co.* (12). There the defendants, who were under contract to the government to supply gunpowder of their manufacture, owing to an accident, were unable to manufacture the powder themselves. They thereupon bought other powder which was in all respects similar to, and as good as, their own, and put it into their barrels and delivered it bearing their marks, and it was argued on their behalf that in these circumstances they had no intent to defraud. Lord Coleridge C.J., in his judgment, said: "The Act is directed against the abuse of trade marks, and the "putting off on a purchaser of, not a bad article, but an article "different from that which he intends to purchase and believes "that he is purchasing. It would apply to cases where a particu"lar article, manufactured by a particular person, had acquired "a widespread reputation . . . and someone supplied another "and a different article under that name, so as to make the "purchaser take something which he did not know he was taking. "That I think, is the meaning of the word 'defraud' as used in "this Act of Parliament, and in that sense only there was in the "present case an intent to defraud". Mathew, J., said: "On "the fair construction of the Act I am of opinion that the words "'intent to defraud' mean more than an intent to cheat a "customer. . . . The words 'without intent to defraud' apply to "cases where a person uses a particular mark without any intent "in so doing to induce a buyer to accept goods which might "otherwise be rejected".

Wood v. *Burgess* (13), was a case under sub-s. 2 where a manufacturer of mineral waters, without authority, filled with mineral water of his own manufacture certain bottles the property, and known by the name of another manufacturer, with the intention of selling such mineral water to the customers of that manufacturer. The magistrate there found that the respondent had no intent to defraud the purchasers of the mineral water and that he must, therefore, be taken to have acted innocently, but that argument was rejected and the court remitted the case to the magistrate to convict.

---

(11) [1925] 1 K. B. 129, 139.

(12) 24 Q. B. D. 90.

(13) 24 Q. B. D. 162.

In *Stone* v. *Burn* (14), the appellant, a bottler of beer, having come into the possession of certain bottles belonging to the Felinfoel Brewery Company and embossed with their name, filled them with Bass's beer, placed Bass & Company's labels upon them and sold the contents as being Bass & Company's beer. The court held that this was the application of a false trade description by reason of s. 5, sub-s. 1, of the Act, and that this defendant was liable to be convicted although no one purchasing would believe that he was getting anything but Bass's beer. On the question whether he had acted innocently, Lord Alverstone, C.J., said (15): " Mere ignorance of the provisions of the " statute does not amount to innocence for this purpose. The " words ' acted innocently ' point to some misapprehension of " fact. And here the appellant did not labour under any mistake " of fact, for he did what he did with full knowledge, and " claiming that he had a right to do it ". Lord Coleridge, J., said (16): " Such innocence can only exist where the infraction " was committed by inadvertance or mistake of fact. And here " the appellant knew all the facts—his only mistake was as to " the effect of the statute ".

Allard v. *Selfridge & Co. Ld.* (17), was again a case under sub-s. 2. There it was found that, on a sale of silk stockings, the defendants had not taken all reasonable precautions against committing the offence, but that the shop assistant, in conducting the sale, had acted in good faith and had not been guilty of fraud. The court held that proof by the defendants of part of paragraph (*a*) of sub-s. 2, could not be relied upon by them as showing that " otherwise they had acted innocently " within paragraph (*c*). All the cases to which I have already referred were considered, and Shearman, J., concluded his judgment by saying: " I think the plain meaning of this statute is that guilt " or innocence is determined by the answer to the question " whether intentionally an act has been done which is contrary " to the words of the statute ".

That case was followed and applied by this court in *Mercer* v. *Pyramid Sand & Gravel Co.* (18), which was again a case under the second sub-section. I cannot see that for the purposes of this Act there would be any real difference between saying that a person acted without intent to defraud and that he acted innocently. Considerations which apply to the latter expression must, I think, apply to the former. I would state the proposition in this way: Where a statute forbids the doing of a certain act, the doing of it in itself supplies mens rea. It is no defence to say, "I did not know of the prohibition", or, "I did not think "that what I was doing amounted to the doing of something "forbidden by the Act". That would be allowing ignorance of the law to be set up as a defence. By throwing an onus on the defendant of proving that he acted without intent to defraud, it seems to me that the statute assumes that the doing of the act alone implies an intent to defraud, but the person charged can escape if he shows that he did not do the act intentionally. His motive does not matter. His understanding of the statute does not matter. There may be an act done by mistake or by accident, such as the delivery of some goods bearing a particular mark to a person who has ordered goods which should have borne another mark, by a confusion of the cases, so that there was merely a misdelivery.

---

(14) [1911] 1 K. B. 927.
(15) Ibid. 931.
(16) Ibid. 933.
(17) [1925] 1 K. B. 129.
(18) (1945) 109 J. P. 54.

It is not necessary to consider all the cases in which this defence might be open to a person charged under either subsection, but if a sale has been deliberately made of goods which it has been shown bear a false description so that the seller intended that those goods should be delivered to the purchaser, there is no room, in my opinion, for this defence to be set up. The line of authority is unbroken and I am not prepared to depart from it.

It should be borne in mind that this Act is intended to protect not only the public or traders who may purchase the goods, but also the proprietors of trade marks and those who manufacture and deal in the genuine article. Prosecutions are, in fact, often brought by other manufacturers or trade associations, and in my opinion those who make what alone may properly be called "vinegar" are quite entitled to have it established that a solution of this character is not truly described as "vinegar" at all. It was intentionally sold as a particular sort of vinegar, which it is not, and I agree that there was no evidence on which the magistrate could find that the defendant had established a defence.

The appeal is dismissed with costs.

HILBERY, J. I agree.

BYRNE, J. I agree. The effect of s. 2, sub-s. 1, of the statute is that a person who applies a false trade description is presumed

1950

KAT
v.
DIMENT.

Byrne J.

to have done so with intent to defraud, but he can escape conviction by proving that he had no intent to defraud.

The presence or absence of an intent to defraud is a question of fact, but in order to determine that question it is necessary to define the words "intent to defraud" and then to ascertain whether the facts come within that definition.

In *London & Globe Finance Corporation Ld.* (19), Buckley J. defined "intent to defraud" in the following way: "To deceive " . . . is to induce a man to believe that a thing is true which is " false, and which the person practising the deceit knows or " believes to be false. To defraud is to deprive by deceit: it is " by deceit to induce a man to act to his injury. More tersely it " may be put, that to deceive is by falsehood to induce a state of " mind; to defraud is by deceit to induce a course of action". That definition received the approval of the Court of Criminal Appeal in *Rex* v. *Bennett and Newton* (20).

The chief magistrate in this case found as a fact that the liquid was not vinegar and that the defendant intentionally sold it as a particular type of vinegar. That finding of fact brought the matter within the definition.

I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Stephenson, Harwood and Tatham; Neve, Beck & Co.*

P. B. D.

---

(19) [1903] 1 Ch. 728, 732.

(20) (1913) 9 Cr. App. R. 146.

COLEBORN (T.) & SONS, LIMITED *v.* BLOND.

C. A.

1950
May 22;
June 21.

Bucknill and Denning L.JJ., and Roxburgh J.

Revenue—Purchase tax—Conversion of army vehicle into shooting-brake —Finance (*No.* 2) *Act*, 1940 (3 *&* 4 *Geo.* 6, *c.* 48), *s.* 18, *sub-s.* 1, *s.* 19, *sub-s.* 1; *sch. VII.*, *No.* 23*—Finance Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 64), *s.* 16, *sub-ss.* 1 *and* 3; *sch. IV.—Purchase Tax* (*Charges*) (*No.* 1) *Order*, 1947 (*St. R. & O.* 1947, *No.* 1182).

The defendant bought an ex-War Department vehicle known as a "Humber four-wheel-drive pick-up vehicle, wireless type" which, when first constructed, had seats for an officer and driver in the cab, and, in the truck, a field radio apparatus and two seats for the use of the men working it. The apparatus was detachable and the vehicle could be used for carrying passengers. The truck portion had no entrance door, but had a tailboard. The defendant

C. A.

1950

Colborn (T.) & Sons, Ld. v. Blond.

handed over the vehicle to the plaintiffs (the truck being without radio apparatus or seats and there being no canopy or roof over it) who undertook to build a shooting-brake body on it. When the work was completed in 1947, the wheels, engine, bonnet and scuttle were the same as when the vehicle was originally constructed, but it had eight seats, a pair of back doors, a permanent roof and a new floor. The plaintiffs supplied all the materials in the construction of the body. Purchase tax on the vehicle having been demanded from the plaintiffs, they paid it and claimed the amount from the defendant, who refused to pay on the ground that purchase tax was not chargeable. The plaintiffs sued the defendant for the amount of purchase tax which they had paid.

Held, that the vehicle handed over by the defendant to the plaintiffs was not constructed or adapted solely or mainly for the carriage of passengers, and that a process of manufacture had been applied so as to make it a vehicle constructed or adapted solely or mainly for the carriage of passengers. Alternatively, even if, when handed over to the plaintiffs, it had been a vehicle constructed or adapted solely or mainly for the carriage of passengers, the work done by the plaintiffs was such that they were not really altering or improving an old car, but were making use of it, or the various parts of it, to make a new car, a new thing having been made out of two parts—the old chassis and the new body. Accordingly, on either view, a process of manufacture had been applied, and, by virtue of sub-ss. 1 and 3 of s. 16 of the Finance Act, 1946, purchase tax was exigible.

Decision of Cassels, J., reversed.

Appeal from Cassels, J.

The defendant in December, 1946, bought an ex-War Department vehicle, known as a "Humber four-wheel-drive pick-up "vehicle, wireless type". This had seats for the officer in charge and the driver in the cab. The truck portion contained a field radio apparatus and two seats for the use of the men working it. The vehicle had been issued to officers, and its main function was to convey an officer when reconnoitring or observing if guns were in action. The radio set was mainly used for receiving and issuing fire orders to artillery. The apparatus was detachable and the vehicle could be used for carrying passengers. The truck portion had no entrance door, but had a tailboard. There was a personnel type of vehicle, similarly built, but it had no radio set, and three seats in the truck portion instead of two.

The defendant took this Humber "wireless type" vehicle to the plaintiffs, who undertook to build a shooting-brake body on it. As presented to them, the vehicle had merely an open truck body behind a cab, for the seats had been taken out, the field radio apparatus removed, and there was no canopy or roof. The wheels, engine, bonnet and scuttle were the same as when the vehicle was originally constructed. When the work was completed

C. A.
1950

COLEBORN (T.) & SONS, LD.
v.
BLOND.

in 1947, the vehicle had eight seats, a pair of back doors, a permanent roof and a new floor, the plaintiffs supplying all the materials in the construction of the body. The Commissioners of Customs and Excise demanded payment of 186*l.* 8*s.* 4*d.* purchase tax on the vehicle by virtue of the Finance (No. 2) Act, 1940 (1), and the Purchase Tax (Charges) (No. 1) Order, 1947. The plaintiffs paid the tax and claimed reimbursement from the defendant. He refused to pay on the ground that purchase tax was not chargeable. Thereupon the plaintiffs sued him for that sum.

Cassels, J., held that purchase tax was not chargeable. In the course of his judgment he said that he did not think that there was a type of this vehicle properly described as a wireless type and another type as a personnel type: it was a wireless and personnel type itself. Counsel before the Court of Appeal admitted that that statement was incorrect.

The plaintiffs appealed.

J. P. Ashworth for the plaintiffs. Purchase tax was chargeable on the result of this process of manufacture, since the result was chargeable goods. The tax is chargeable on goods resulting from the process, i.e., a road vehicle constructed or adapted solely or mainly for the carriage of passengers: see No. 23 of the items of chargeable goods in Sch. VII to the Finance (No. 2) Act, 1940, and ss. 16 and 17 of the Finance Act, 1946. The tax is not chargeable merely on the body of the shooting-brake under s. 21 of that Act. Purchase tax is, in reality, a sales tax. By s. 16, sub-s. 3, of the Finance Act, 1946, "process of manufacture" means a process applied so as to make goods or in the course of making goods. That is what happened here: what was made was a road vehicle constructed or adapted solely or mainly for the carriage of passengers: see *Guildford Corporation* v. *Brown* (2), in which *Gamble* v. *Jordan* (3) was distinguished. It is not suggested that mere repair work is chargeable under s. 16. What was done here was not mere repair: an entirely different article was constructed from the old ex-War Department vehicle. Though s. 21 of the Act of 1946 does not apply, it shows that what was done here was contemplated as being chargeable to process tax. In *Hubbard* v. *Messenger* (4) what was in issue was a vehicle constructed " solely " for the carriage of passengers and their effects. As to the meaning of " adapted " in the phrase " constructed or adapted solely or mainly for the carriage of " passengers ", see the judgment of Lord Reading, C.J., in *French* v. *Champkin* (5).

---

(1) No. 23 of the items of chargeable goods set out in Sch. VII to the Finance (No. 2) Act, 1940, is as follows: "Road vehicles . . . (whether "mechanically propelled or not) being "vehicles . . . constructed or "adapted solely or mainly for the "carriage of passengers except as "specified in the 3rd column". (See s. 18 sub-s. 1, and s. 19 sub-s. 1 of the Act.) The vehicle was not within the exceptions in the 3rd column.

Finance Act, 1946, s. 16 sub-s. 1: "For the purposes of any enactment "relating to purchase tax, a person "shall be deemed to apply a chargeable process if he applies any process of manufacture which results "in chargeable goods of any of the "classes specified in the Fourth "Schedule to this Act, whether or "not the goods to which the process "was applied were, before the process was applied, goods of the same "class or any other class specified in "that Schedule."

Sub-section 3: "In this section, "the expression 'process of manufac- "'ture' means a process applied so "as to make goods or in the course "of the making of goods."

One of the classes specified in Sch. iv was, "Road vehicles . . . "(whether mechanically propelled or "not)."

From the last words of s. 16, sub-s. 1, of the Finance Act, 1946, it is clear that purchase tax was exigible even if the vehicle handed over to the plaintiffs was a vehicle, constructed or adapted solely or mainly for the carriage of passengers; but it was not such a vehicle. It was a " Humber four-wheel-drive pick-up vehicle, wireless type ", and used for reconnoitring or observation and the reception and issuing of fire orders. Its primary purpose was to send therefrom wireless messages. It was no more a vehicle constructed or adapted solely or mainly for the carriage of passengers than an armoured car or an ambulance. It had not been altered since it was constructed, though the wireless apparatus, which was detachable, had been detached and the two seats for the operators removed. From a vehicle constructed or adapted for this use of sending and receiving wireless messages it was, by process of manufacture, made into a vehicle constructed or adapted solely or mainly for the carriage of passengers, i.e., a shooting-brake. The whole character of the vehicle was changed.

J. R. Crichton for the defendant. This vehicle was originally constructed mainly for the carriage of passengers. A passenger merely means a human being carried from one place to another. If the passenger is occupied in performing some duty, it does not make him the less a passenger. A general officer in a car, whilst on operational duties, would still be a passenger. The wireless apparatus was merely something incidental to the giving of orders —fire orders. This vehicle, when it was constructed, was essentially a passenger-carrying vehicle, and this is so, although the trial judge may well have been in error when he said, " I do not " think that there was a type of this vehicle properly described as a " wireless type, and another type of this vehicle described as a " personnel type ".

The plaintiffs did not employ a process of manufacture on this

(2) [1915] 1 K. B. 256.
(3) [1913] 3 K. B. 149.
(4) [1938] 1 K. B. 300.
(5) [1920] 1 K. B. 76, 79.

chassis by placing a new body on it. The unit which emerged after this work had been done upon it was the same as the unit which the defendant handed over to the plaintiffs for the work to be done to it: that is, a vehicle constructed mainly for the carriage of passengers. The plaintiffs did not manufacture a car and they did not adapt a car not mainly used for the carriage of passengers to one mainly used for the carriage of passengers. The plaintiffs are not manufacturers of cars but of the bodies of cars. To attract purchase tax, the plaintiffs should have manufactured a road vehicle. They manufactured the body of a car and put it on this car. What is taxable is the vehicle. No doubt, the vehicle was furnished with a new body, but it remained essentially the same vehicle. Section 21 does not apply, since there was here no process of manufacture applied to the vehicle. In a word, the plaintiffs did not make chargeable goods. They did not make a new road vehicle, but a new body for a road vehicle; and it is the making of a road vehicle which is taxed.

Ashworth in reply. The issue is: did the plaintiffs apply a process so as to make goods, i.e., a shooting-brake? The only answer is that they did, and therefore purchase tax was exigible.

Cur. adv. vult.

June 21. BUCKNILL, L.J. [after stating the facts and reciting the material statutory provisions:] The crucial question in this case is whether the work done by the plaintiffs was a process of manufacture which made, or was in the course of making, a vehicle constructed solely or mainly for the carriage of passengers: see s. 16, sub-s. 3, of the Finance Act, 1946. If it was such a vehicle when it was originally constructed, then the work done by the plaintiffs in converting it into a shooting-brake was, so to speak, merely a change of dress, but not a change of character. There is no direct authority on the point, which seems to depend for its decision on the inference to be drawn from the admitted facts. In my opinion, the mere fact that a vehicle, in the course of the work for which it was designed, habitually carries a man or men does not ipso facto make it a vehicle constructed solely or mainly for the carriage of passengers. Every vehicle, unless controlled by wireless, must have a driver, and is, in a sense, constructed for the carriage of a passenger. But No. 23 of the items of chargeable goods in Sch. VII to the Act of 1940 speaks of road vehicles "constructed or adapted solely or mainly "for the carriage of passengers", and therefore, if the accommodation for carrying passengers is only incidental to the use of the vehicle for other purposes, it would be exempt. Thus the crew of an armoured car or the driver and attendants in an ambulance are all, in one sense, passengers; but the main purpose which causes their presence in the vehicle is not their transportation from place to place: the cause of their presence in the vehicle is that they may use it for the special purposes for which it was constructed. In my opinion, the error which the judge made in failing to distinguish between the wireless type and the personnel type of this particular species of car indicates a failure to distinguish between the two different purposes for which each type was used.

Moreover, I think that the concluding words of s. 16, sub-s. 1, of the Finance Act, 1946, indicate that, even if the vehicle was originally constructed to carry passengers, yet, if the work done by the plaintiffs was to manufacture a thing which was different from what it was before the work was done, in other words, if the work was such as to involve an alteration in the article so fundamental as to produce a different article, then purchase tax would be chargeable on the article so produced. In my opinion, these tests being applied, the shooting-brake, when constructed, was a different article from that handed over by the defendant to the plaintiffs before the work was done.

The cases to which we were referred do not seem to throw much light on the problem. They rather indicate the difficulty of coming to a right decision in this case. On the meaning of the words " making goods " there is *Gamble* v. *Jordan* (6). A man was charged with the offence of using, for the purpose of making an article of bedding, flock manufactured from rags. The person charged had taken rag flock from an old mattress for the purpose of restuffing the same mattress with the same flock. The magistrate held that the restuffing of a mattress was the making of an article of bedding, and convicted the man, but, on appeal, the conviction was set aside. Bankes, J., in his judgment, said that, in his opinion, no distinction ought to be drawn between the word " manufacture " and the word " make ". He thought that the true meaning of making or manufacturing an article was " bringing into being " that article. On the other hand, in *Guildford Corporation* v. *Brown* (7), a man charged with an offence under the same Act, the Rag Flock Act, 1911, had taken flock manufactured from rags from two old mattresses and intended to put the same flock without any addition to or subtraction from it, into new covers. On appeal, the Divisional Court held that it was " manufacturing " a mattress if one took flock out of an old cover and put it into a new one. As Lush, J., remarked, " there is a " great difference between re-making an old article and making a " new one. It is clear on the facts of this case that the respondent " made a new article ". The reasoning of Lush, J., seems applicable to the case before us. It is true that the new vehicle had as some of its component parts, parts of the old vehicle, but that does not prevent the work from being described as making a new article, if the new vehicle is sufficiently different from the old.

---

(6) [1913] 3 K. B. 149.

(7) [1915] 1 K. B. 256.

In *French* v. *Champkin* (8), the question for decision was was whether a certain carriage was a vehicle constructed or adapted for use, and used solely for the conveyance of any goods, in the course of trade within the meaning of s. 4, sub-s. 3, of the Customs and Inland Revenue Act, 1888. Lord Reading, C.J., in the course of his judgment said (9): "The justices seem to have "treated the word 'adapted' as if it were synonymous with "'suitable' or 'apt', whereas it must be construed as meaning "altered so as to make the vehicle apt for the conveyance of "goods. The words are intended to cover the case of a vehicle "which was not constructed solely for the purpose of conveying "goods in the course of trade, but after its construction has been "made apt for that purpose. If the vehicle has not been originally constructed for the conveyance of goods, it is still entitled "to exemption, if by some alteration it has been made suitable for "the purpose mentioned". It has not been suggested in the present case that the vehicle had been adapted for the carriage of passengers before it became the property of the defendant, and the fact that it then could be used for the conveyance of passengers did not make it a vehicle "constructed or adapted solely "or mainly for the carriage of passengers", if that was not its primary purpose.

In my judgment, therefore, the vehicle was not originally constructed or adapted solely or mainly for the carriage of passengers. Alternatively, even if it had been so constructed or adapted, the work done by the plaintiffs was of such a nature as to bring into being a different article from that which it had been before that work was done. I therefore think that this appeal should be allowed.

DENNING, L.J. In order that a process of manufacture should attract purchase tax, it must be "applied so as to make goods or "in the course of the making of goods": see sub-s. 3 of s. 16 of the Finance Act, 1946. Therefore, there must be a making of goods, which is, I think, different from the repair, alteration or improvement of goods. If the thing remains in substance the same thing, even though repaired, altered or improved, purchase tax is not payable. But if the work has made it into a different thing altogether, then purchase tax is payable. The line between these two is very difficult to draw, because it is so much a question of degree. Speaking generally, I should have thought that, if you replace an old engine by a new one, or an old body by a new body,

---

(8) [1920] 1 K. B. 76.

(9) Ibid. 79.

BIBL. LONDIN UNIV.

C. A.
1950

Coleborn (T.) & Sons, Ld. v. Blond.

Denning L.J.

you are not making a different vehicle: you are altering and improving an old one, and purchase tax is not payable. But a point may be reached where you are not really altering or improving an old car, but are making use of it, or the various parts of it, in order to make a different car altogether. That point has, I think, been reached here. This old army wireless-type vehicle was, so to speak, the raw material out of which the shooting-brake was made. It was a case where a new thing was made out of two parts—one part being the old chassis and the other part being the new body—and the two parts when assembled together make a different thing from either of them separately. In my opinion, therefore, purchase tax was payable upon it.

Roxburgh, J. I agree.

Appeal allowed.

Solicitors: *Bower, Cotton & Bower; Cartwright, Cunningham & Co., for Donnison & Edwards and Cornish, Liverpool.*

C. G. M.

1950
July 5, 6.

Somervell L.J.

DAVIES *v.* DE HAVILLAND AIRCRAFT CO., LD.

Factories—Workman's fall in passage leading to canteen—Patch of greasy substance on floor—Duty to "maintain" passages—Extent—Liability of employers—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 25, *sub-s.* 1, *s.* 26, *sub-s.* 1.

A factory worker was walking along a passage to the canteen during the mid-morning break when, on turning a corner, he slipped on a patch of greasy substance which had accumulated in a slight depression in the concrete floor, fell and injured himself. The patch consisted of accumulated rainwater with which oil from the foundry might have become mixed. On the worker's claim against his employers for damages for breach of duty under ss. 25, sub-s. 1, and 26, sub-s. 1, of the Factories Act, 1937, and at common law,

Held, (1) that, as the passage was a means of access to the canteen, and not to a place at which a person had at any time to work, s. 26, sub-s. 1, was inapplicable, and, *semble*, would be inapplicable whether a person were going to or returning from the canteen; (2) that the existence for an uncertain period of an unexplained patch of oil or water on the floor of the passage did not amount to a breach of the employer's duty to maintain under s. 25, sub-s. 1, for it would be impracticable so to maintain passages,

[Reported by Miss Sheila Cobon, Barrister-at-Law.]

etc., that there was never a slippery place where, especially after rain, a man might slip; and (3) that there had in the circumstances been no failure by the employers to comply with their duty, as stated by Lord Herschell in *Smith* v. *Baker* [1891] A. C. 325, 362, of taking care to protect their employees from unnecessary risk.

ACTION, tried by Somervell, L.J., sitting as an additional judge in the King's Bench Division.

The plaintiff, William Davies, was employed as a tool fitter by the defendants, De Havilland Aircraft Co., Ld. On October 14, 1948, during the mid-morning break, he was walking down a passage leading to the canteen when he slipped on a patch of greasy substance on the floor at the corner of the passage, caught his foot in machine tools stored there, and fell and broke his ankle. He sued his employers for damages for personal injuries, alleging negligence by them and/or breach of statutory duty in that they had failed properly to maintain the floor of the said passage by causing or permitting oil and/or grease to be thereon, contrary to s. 25, sub-s. 1 of the Factories Act, 1937 (1).

R. M. Everett for the plaintiff.
John Thompson for the defendants.

SOMERVELL, L.J. [after stating the facts and reviewing the evidence.] I am not satisfied that there was a lump of grease or oil on the floor such as some of the witnesses have described. It is common ground that there was a slight depression in the concrete floor where, after rain, which had fallen at the time of the accident, mud and oil might accumulate; and it is possible that oil from the foundry had been brought in on the men's boots and had become mixed with the mud to form a slippery mixture.

The question is whether the presence of that slippery mixture entitles the plaintiff to recover on the ground that there has been a breach of the Factories Act, 1937, or negligence at common law. The plaintiff relies first on s. 26, sub-s. 1 of the Act. As the plaintiff was going to the canteen, it does not seem to me that he comes within the words of that sub-section. Although this sub-section has been given a rather wider meaning than some people have suggested, my own view is that the provision of the Factories Act intended to cover a passage of this kind is s. 25, sub-s. 1, and I would therefore lean against an overlapping of the two sub-sections in a case where I do not think that the words of s. 26, sub-s. 1, aptly fit the case. The evidence shows that this passage was a means of access to the canteen and not a means of access to a place at which any person had at any time to work; and it would be outside the sub-section whether a man were going to the canteen or coming from it.

---

(1) Factories Act, 1937, s. 25, sub.-s. 1: "All floors, steps, stairs, "passages and gangways shall be of "sound construction and properly "maintained".
Section 26, sub-s. 1: "There "shall, so far as is reasonably "practicable, be provided and main-"tained safe means of access to "every place at which any person "has at any time to work".

Section 25, sub-s. 1, however, provides that " all floors, steps, " stairs, passages and gangways shall be of sound construction " and properly maintained "; and in the definition section of the Act " maintained " is defined as " maintained in an efficient " state, in efficient working order, and in good repair ". Even assuming a slippery patch of water or an unexplained patch of oil, I do not think that it would come within those words. The fact that, for an uncertain period and in circumstances which no one can explain, there was a patch of oil on the floor, does not amount to a breach of the duty of maintaining. Equally, on the assumption that there was a slight depression in the concrete, where, after rain, there was a patch of water which made the surface slippery, there has been no breach of that sub-section. It would be impracticable so to maintain passages, roads and pathways that there was never a slippery place where, especially after rain, a workman might slip. Slipping is quite a common incident of life, and mostly no harm is done by it, although unfortunately this plaintiff did suffer serious injury.

The same general approach which leads me to think that there was no breach of the statute leads me to hold that there was no breach of duty at common law. It is generally agreed that the duty is thus accurately stated in the often-quoted words of Lord Herschell in *Smith* v. *Baker* (2): " It is quite clear that " the contract between employer and employed involves on the " part of the former the duty of taking reasonable care to provide " proper appliances, and to maintain them in a proper condition, " and so to carry on his operations as not to subject those " employed by him to unnecessary risk ". I find it quite impossible to say that the mere existence of what I have found resulted in the plaintiff's fall indicates any failure to take reasonable care to protect those employed from unnecessary risk. This claim fails.

Judgment for the defendants.

Solicitors: *Rowley, Ashworth & Co.; Clifford-Turner & Co.*

---

(2) [1891] A. C. 325, 362.

REX *v.* POPLE AND OTHERS

C. C. A.

1950
July 6, 7, 18.

Humphreys, Finnemore and Slade JJ.

Criminal law—Procedure—Indictment—Amendment—Indictment "defective"—Error in description—Charges of obtaining money by false pretences—Cheques obtained—Jurisdiction to order amendment—Duty of counsel for prosecution—Indictments Act, 1915 (5 *&* 6 *Geo.* 5, *c.* 90), *s.* 5, *sub-s.* 1.

By s. 5, sub-s. 1, of the Indictments Act, 1915, a court has power to order the amendment of an indictment if it appears to it that it is "defective".

The power to amend an indictment is not limited to the case where the defect is such that the indictment is bad on its face, but extends to errors in description.

Where, therefore, an indictment contained charges of obtaining money by false pretences, whereas in fact valuable securities, that is, cheques, had been obtained,

Held, that the court had power to order the indictment to be amended accordingly.

Counsel for the prosecution is responsible for satisfying himself that an indictment is correct before opening a case, and, if it needs amendment, he should make the necessary application before the arraignment of the prisoner.

APPEAL against conviction.

One Pople and others were indicted on counts of obtaining certain sums of money by false pretences from a building society. At the close of the case for the prosecution objection was taken that there was no evidence to support those charges. The matter having been argued, the prosecution applied for leave to amend those counts by altering in each count the sum of money to "a "valuable security, to wit, a cheque for" the same amount. The trial judge made an order granting that application. The defendants appealed on the ground, among others, that the judge had no jurisdiction under the Indictments Act, 1915, s. 5, sub-s. 1, to allow that amendment.

The case is reported only on that point.

Scott Henderson K.C., J. T. Molony, Ian Hill, R. I. Gray, Norman Brodrick, E. B. McLellan, Michael King and *J. Jenkins* for the appellants.

Fox-Andrews K.C. and *Humfrey Edmunds* for the prosecution.

Cur. adv. vult.

July 18. HUMPHREYS J., delivering the reserved judgment of the court, said, on the point reported:—As originally drawn, counts of the indictment alleged against certain of the accused persons the offence of obtaining various sums of money from the building society by false pretences set out in the various counts. The case was a long one occupying some twelve days, and at the close of the case for the prosecution objection was taken that there was no evidence to support the charges of obtaining money by the different accused. The matter having been argued, the prosecution applied for leave to amend those counts by altering in each count the sum of money alleged to have been obtained to " a valuable security, to wit, a cheque for " that sum of money. That application was granted and the first question argued before us on this appeal was whether the judge had any jurisdiction to direct that amendment.

The power to amend an indictment has been contained since 1915 in s. 5, sub-s. 1 of the Indictments Act of that year. That enactment, as is generally known, was passed mainly for the purpose of doing away with the technicalities and redundancies of pleading in criminal cases. Up to that time the powers of amendment had been very limited, and the section in question provides and, as we think, was intended to provide, that in future the power should be very considerably extended. By s. 5, sub-s. 1, " Where, before trial, or at any stage of a trial, it " appears to the court that the indictment is defective, the court " shall make such order for the amendment of the indictment " as the court thinks necessary to meet the circumstances of the " case,"—then follow the all-important words—" unless, having " regard to the merits of the case, the required amendments " cannot be made without injustice. . . ."

The argument for the appellants appeared to involve the proposition that an indictment, in order to be defective, must be one which in law did not charge any offence at all and therefore was bad on the face of it. We do not take that view. In our opinion, any alteration in matters of description, and probably in many other respects, may be made in order to meet the evidence in the case so long as the amendment causes no injustice to the accused person. There is the most ample power in such a case, or in any case where the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by any such amendment, to direct that one person should be tried separately from others, or the trial may be postponed. It is to be observed that in this case the matter in respect of which the prosecution suggested that the indictment was defective was in the mere description of the thing obtained. In substance, the charge was the same, but in the view of the prosecution it was necessary to show that what was referred to in the count was not the actual sum of money obtained but the cheque, that is, the valuable security with which in fact the building society parted. We have no hesitation in this case in supporting the action of the judge in amending the indictment.

[After considering other questions raised by the appeal, his lordship added:] The responsibility for the correctness of an indictment lies in every case on counsel for the prosecution and not on the court. No counsel should open a criminal case without having satisfied himself on that point. If in his opinion the indictment needs amendment, the necessary application should be made before the accused are arraigned and not, as in this case, after all the evidence for the prosecution has been called. There may well be amendments which would properly be made at the beginning of a trial which would be oppressive and embarrassing to the accused if made at the close of the case for the prosecution.

Submission overruled.

Solicitors: *Director of Public Prosecutions; Cunliffe and Airy, for White, Nash & Brooks, Winchester; G. A. MacDonald, Portsmouth; Registrar, Court of Criminal Appeal.*

R. P. C.

S.S. ARDENNES (CARGO OWNERS) v. S.S. ARDENNES (OWNERS).

[1948 A. 1804.]

1950
June 27, 28, 29;
July 5.

Lord Goddard C.J.

Shipping—Bill of lading—Oral contract of carriage—Bill not contract—Evidence of contract admissible—Deviation—Late delivery of fruit—Measure of damages—Loss of market.

Exporters of mandarin oranges shipped a cargo of them in the defendants' vessel in reliance on an oral promise by the shipowners' agent that the vessel would go straight to London. In fact, she went first to Antwerp, with the result that, when the plaintiffs' cargo arrived in London, (a) there had been an increase in the import duty on mandarins, and (b) other cargoes of mandarins had arrived in London, with a consequent fall in the price of mandarins, all of which events would have taken place after the arrival of the defendants' vessel had she gone direct to London. On the shippers' claim for damages,

Held, that, the bill of lading not being in itself the contract between shipper and shipowner, though evidence of its terms (*Sewell* v. *Burdick* (1884) 10 App. Cas. 74, per Lord Bramwell at p. 105; *Crooks* v. *Allan* (1879) 5 Q. B. D. 38), evidence was admissible of the

[Reported by Mrs. F. N. BUCHER, Barrister-at-Law.]

1950

S.S. Ardennes (Cargo Owners) v. S.S. Ardennes (Owners).

oral contract of carriage arrived at between the shippers and the shipowners' agent before the bill of lading had been signed; that the promise that the ship would sail direct to London was a warranty; and that the shipowners were liable in damages in respect of the increased import duty which the shippers had had to pay, and to the extent that the delayed arrival had caused them loss of market.

The Parana (1877) 2 P. D. 118 distinguished.

Action.

The plaintiffs, Antonio Cabarro Tornero and others, shippers, were fruit growers in and exporters of fruit from Spain. They alleged that by an oral contract made on or about November 20, 1947, the agent of the defendants, the owners of the S.S. *Ardennes*, had agreed with the shippers' agent to load on board the S.S. *Ardennes* at the port of Cartagena 3,000 cases of mandarin oranges, the property of the shippers, and to ship them direct to London. At that time the vessel was loading at the port of Gandia, having previously called at Tarragona, Barcelona and Valencia. At Tarragona and Barcelona she had taken on cargo for Antwerp, and at Valencia and Gandia a cargo for both Antwerp and London. The London cargo from those ports was stowed beneath the cargo destined for Antwerp, and her clearance papers showed that she was sailing from those ports for Antwerp.

The vessel arrived at Cartagena on November 22, 1947, and, after loading the plaintiffs' cargo, the shipowners' agent issued to the shippers a bill of lading containing the following terms among others: "Received for shipment in apparent good order "and condition . . . in and upon the steamship called the "*Ardennes* or upon any other steamship substituted or following "with liberty to call any port or ports for the purpose of receiving and delivering coals, cargo or passengers or for any other "purpose whatsoever . . . and bound for London the undernoted goods said to be three thousand cases of mandarin "oranges, 90,000 kgs. . . . 2. The owners are to be at liberty to "carry the said goods to their port of destination by the above "or other steamer or steamers, ship or ships, or railway . . . proceeding by any route and whether directly or indirectly to such "port, and in doing so to carry the goods beyond their port "of destination, and so tranship or land and store the goods "either on shore or afloat and reship and forward the same at "the owners' expense but at merchant's risk . . . ".

Instead of sailing direct to London, the vessel went first to Antwerp, where 374 cases of the plaintiffs' mandarins were unloaded and left behind together with other cargo consigned to Antwerp. She arrived at the Port of London on December 4, 1947, where the remaining 2,626 cases were unloaded on December 5. Of the 374 cases unloaded at Antwerp, 362 cases were delivered in London by another ship on December 15, and the remaining 12 cases were lost.

Meanwhile, on November 28, 1947, the S.S. *Palayo* from Cartagena delivered a cargo of mandarin oranges at the Port of London, and between that date and the arrival of the S.S. *Ardennes* three other cargoes of mandarin oranges also arrived at the port. Owing to these supplies, the market price for mandarin oranges in London fell from 4*l*. 3*s*. 2*d*. a case to 3*l*. 0*s*. 11*d*. realized on the 2,626 cases belonging to the plaintiff shippers, and 1*l*. 19*s*. 5*d*. a case realized on the 362 cases delivered on December 15.

Since 1932 the import duty charged at British ports on mandarin oranges has been raised each year on December 1 from 3*s*. 6*d*. a cwt. to a 10 per cent. ad valorem duty. By reason of the fact that the plaintiff shippers' cargo was delivered after November 30, therefore, they had to pay additional duty of 451*l*. 1*s*. 7*d*.

They accordingly claimed damages consisting of the amount of extra duty paid, and loss of profit on the cargo owing to the fall in the market price of mandarin oranges.

Sir William McNair, K.C., and *Charles Lawson* for the shippers. A bargain was made at Cartagena which may be regarded either as a collateral oral warranty, or as one of the terms of a contract which is composed of the bargain, the receipt of the goods for shipment, and the bill of lading. The bargain was that the ship should sail direct to London for arrival before December 1.

A bill of lading is only "best evidence" of a contract: it is not the true contract: *Crooks* v. *Allan* (1); *Moss Steamship Co.* v. *Whinney* (2). It is open to the shipper to prove what the true bargain was if he alleges it to be different from that stated in the bill of lading.

A shipowner engaged in shipping seasonable fruit to London must be taken to know the ordinary practices and exigencies of that trade. He must have known that the import duty had changed annually, since 1932, on December 1. Therefore it was reasonably foreseeable that loss would result from breach of the contract to arrive at the Port of London before December 1.

Even assuming that the shippers cannot rely on the collateral bargain, and that the bill of lading governs the matter, in order to go outside the contract voyage from Cartagena to London, the

(1) (1879) 5 Q. B. D. 38.

(2) [1912] A. C. 254, 264.

1950

S.S. ARDENNES (CARGO OWNERS) *v.* S.S. ARDENNES (OWNERS).

"liberties" clauses must define the liberties expressly as being part of the agreed voyage: *Connolly Shaw, Ld.* v. *A/S Det Nordenfjeldske D/S* (3). The liberty clauses in the bill of lading are inconsistent. Clause 2 gives much wider liberties than those given by the preamble. It is therefore in conflict with the preamble. There being two clauses concerned with the same subject-matter, the document is ambiguous and affords no protection to the shipowner: see *Nelson Line, Ld.* v. *Nelson* (4).

The shipowners can rely on exceptions in the bill of lading only if they prove that deviation has been waived: see Scrutton on Charterparties (15th ed.), p. 288; *Hain Steamship Co., Ld.* v. *Tate & Lyle, Ld.* (5). There was no waiver here: the goods were taken and paid for solely to minimize the shippers' loss.

Sir Robert Aske, K.C., Mocatta, and *Michael Holman* for the shipowners. The contract between the parties was the bill of lading, and their rights and liabilities are determined by what it contains. There is no difference between a contract in a bill of lading and any other contract: see *Leduc & Co.* v. *Ward* (6). Evidence of an oral bargain in conflict with a bill of lading is not admissible. It is not conceded that any such bargain was made. If it was, it was made without authority. Parol evidence cannot be given which is inconsistent with a term of a bill of lading: see *The Delaware* (7). Here there is a bill-of-lading contract providing not for direct carriage to London, but for carriage not by a particular steamer, and even by railway, and by any route, directly or indirectly. The words used are the widest conceivable. The ship is at liberty to go by any route at all, subject only to one limitation, that the liberty cannot be used if in the circumstances it would frustrate the intended purpose of the contract. The liberty provisions here are contained in the preamble to the bill of lading and in clause 2. They are exclusive, but complementary, and their effect is cumulative. They are not inconsistent in their terms. There is no authority to the effect that the scope of any liberty clause must be cut down by other such clauses. In the *Connolly Shaw* case (8) a ship had liberty to go beyond her port of destination although the voyage from port to port was clearly defined. This is a stronger case, as here the voyage is not defined in terms as direct from Cartagena to London.

It is almost inconceivable that an oral agreement in the terms alleged would have been made. An agreement to go direct to London so as to arrive there by November 30 would have been commercially ridiculous at a time of year when weather is bad. Moreover, her cargo, before her arrival at Cartagena, was so stowed that it would have been commercially impracticable to unload at London before Antwerp.

---

(3) (1934) 49 Ll. L. Rep. 183, 184.

(4) [1908] A. C. 16.

(5) (1936) 41 Com. Cas. 350.

(6) (1888) 20 Q. B. D. 475, 479, 485.

(7) (1871) 14 Wall. Rep. 579.

(8) 49 Ll. L. R. 183.

McNair, K.C., in reply. The shippers would not have put these goods on the *Ardennes* unless assured of delivery by November 30. A bill of lading is not conclusive as between shipper and the shipowner. *Leduc & Co.* v. *Ward* (9) is distinguishable, as that case was concerned with a dispute between the endorsee of a bill and the shipowner. Before endorsement over, a bill of lading is not the written contract between the parties so as to attract the rules as to admissibility of parol evidence: see Scrutton on Charterparties (15th ed.), art. 3, p. 10. Different considerations may arise when the document has been endorsed over, because then the Bills of Lading Act, 1855, s. 1, operates to transfer to the endorsee the rights and obligations evidenced by the bill of lading: see Scrutton on Charterparties (15th ed.), p. 495. The court is not prevented from finding out what was the proper contract. In this case it was that the *Ardennes* should go direct to London; and on the faith of that bargain these goods were put on board.

Cur. adv. vult.

July 5. LORD GODDARD, C.J., reading his judgment, stated the facts and continued:—The defences raised were in substance that there was no oral agreement, and reliance is placed on one of the conditions in the bill of lading. I have no hesitation in finding that there was a promise made to the shippers' representative that the ship should go direct to London, and that they shipped in reliance on that promise. I therefore have now to consider the defence which arises out of the terms of the bill of lading. [His Lordship read it.] Sir Robert Aske contended that the second of these clauses is a complete defence and, indeed, that evidence of any other bargain or promise is not admissible; and that seems to me to be the main question which falls for decision in this case.

It is, I think, well settled that a bill of lading is not in itself the contract between the shipowner and the shipper of goods, though it has been said to be excellent evidence of its terms: *Sewell* v. *Burdick*, *per* Lord Bramwell (10) and *Crooks* v. *Allan* (11). The contract has come into existence before the bill of lading is signed; the latter is signed by one party only, and handed by him to the shipper usually after the goods have been put on board. No doubt if the shipper finds that the bill contains

(9) 20 Q. B. D. 475.
(10) (1884) 10 App. Cas. 74, 105.
(11) 5 Q. B. D. 38.

terms with which he is not content, or does not contain some term for which he has stipulated, he might, if there were time, demand his goods back; but he is not, in my opinion, for that reason, prevented from giving evidence that there was in fact a contract entered into before the bill of lading was signed different from that which is found in the bill of lading or containing some additional term. He is no party to the preparation of the bill of lading; nor does he sign it. It is unnecessary to cite authority further than the two cases already mentioned for the proposition that the bill of lading is not itself the contract; therefore in my opinion evidence as to the true contract is admissible.

Leduc & Co. v. *Ward* (12), on which Sir Robert Aske so strongly relied, was a case between shipowner and endorsee of the bill of lading, between whom its terms are conclusive by virtue of the Bills of Lading Act, 1855, so that no evidence was admissible in that case to contradict or vary its terms. Between those parties the statute makes it the contract. In any case, the representation that the ship would sail direct to London would amount to a warranty, for it was in consequence of that representation that the goods were shipped, both parties being fully aware of its high importance in the circumstances; or, as it might be put, it was a promise that the shipowner would not avail himself of a liberty which otherwise would have been open to him.

As I have formed this view, it is unnecessary for me to consider the other matters argued by Sir William McNair, for instance, whether the liberty clause is not inconsistent with the opening clause of the bill of lading. I do not think that there is anything in the point as to waiver taken in the defence. For whatever reason, the ship arrived late, later, that is, than she would have arrived had she not gone first to Antwerp. She had the plaintiffs' goods on board, and they were of a perishable nature. I cannot see that they can be said to have waived their claim for damages because they took delivery and paid the freight rather than let the goods remain to be dealt with in some way by the shipowners, a course which might and probably would have largely increased the damages, as the fruit might then well have perished, or at least deteriorated. This is also true of the 362 cases which arrived later.

I have now to consider the question of damages. Sir Robert Aske agreed that, if his clients were liable for breach of contract, they were liable for the excess amount of duty which had to be paid by reason of the ship's arriving after November 30. The excess is agreed at 451*l*. 1*s*. 7*d*. With regard to the plaintiffs' claim for loss of market, it was urged that I ought to find that, had she not gone to Antwerp, the ship would have arrived before, or at least not later than, the *Palayo* which arrived on November 28. But I have had no evidence as to that ship's performance or speed; and, having considered the evidence of the master of the *Ardennes*, I do not feel able to find more than that she would have arrived on November 29, and probably early that day, which was a Saturday. Accordingly, at whatever time she arrived that day, and whether or not she would have been discharged that day or on Sunday, the goods could not have been sold at Covent Garden before December 2.

---

(12) 20 Q. B. D. 475.

The cargo on the *Sven Jarl*, which arrived on November 26 and was the first ship with mandarins to arrive in the Port of London that season, averaged 4*l*. 18*s*. 10*d*. a case gross. The *Palayo's* cargo averaged 4*l*. 3*s*. 2*d*. a case gross. I do not think I can find that, had the *Ardennes* come direct, her cargo could have been sold at Covent Garden before that of the *Palayo*, and it seems to me that the two cargoes would have got on to the market at about the same time. If, therefore, there had been 4,668 cases on sale instead of only the 1,668 brought by the *Palayo* I should expect that the price realized would have been less than that which the *Palayo's* cargo in fact fetched. The sharp drop to a gross of 3*l*. 0*s*. 11*d*. which was what the goods on the *Ardennes* fetched was no doubt caused by the arrival of three other fruit ships from Valencia. I must therefore find some figure as that which would have been realized if the goods had arrived and been sold at the same time as the *Palayo's* cargo, and I think a fair figure to fix is 4*l*. 0*s*. 0*d*. per case gross.

This case is, in my opinion, quite distinguishable from *The Parana* (13) because all parties must have been aware that the earlier the goods arrived the better would be the price. The case is much more akin to *Dunn* v. *Bucknall Bros.* (14). The parties must therefore calculate what the goods would have fetched net assuming that they had been sold at 4*l*. 0*s*. 0*d*. a case, as I do not know what the commission and handling charges would have been.

There will be judgment for the plaintiffs for that amount and for 451*l*. 1*s*. 7*d*. in addition, representing the increased duty.

Judgment for the plaintiffs.

Solicitors: *Chapman-Walkers*; *Holman, Fenwick & Willan.*

---

(13) (1877) 2 P. D. 118.

(14) [1902] 2 K. B. 614.

1950
July 18,
19, 26.

Lord Goddard C.J.,
Hilbery and
Byrne JJ.

REX *v.* SANDBACH JUSTICES; *Ex parte* SMITH.

Infants—Custody—Application by mother—Mother and father resident in different counties—Infant in Northern Ireland—What court of summary jurisdiction competent—Jurisdiction of court where child outside jurisdiction—Guardianship of Infants Act, 1886 (49 *&* 50 *Vict. c.* 27), *ss.* 5, 9—*Guardianship of Infants Act*, 1925 15 *&* 16 *Geo.* 5, *c.* 45), *s.* 7, *sub-s.* 1.

The effect of the Guardianship of Infants Acts, 1886 and 1925, is that only a court of summary jurisdiction for the place where the respondent to an application for the custody of a child resides is competent to entertain it.

Where, therefore, justices in Cheshire made an order on the application of the mother, living in Cheshire, of a child living in Northern Ireland, committing to her its legal custody, and the father, respondent to the application, was living in Oxfordshire,

Held, that the justices had no jurisdiction to make the order.

An English court has, in general, jurisdiction to make an order relating to the custody of an infant notwithstanding that the infant is out of the jurisdiction, but it must be very unusual and would in many cases be a most undesirable course, more especially for justices, to take.

APPLICATION for an order of certiorari.

The father of a child lived at Filkins, Oxfordshire, the mother, his wife, in Alsager, Cheshire, and the child with the mother's aunt in Northern Ireland. On the application of the mother, Sandbach (Cheshire) justices made an order awarding her the legal custody of the child and directing the father to pay 1*l.* a week for its maintenance until it attained the age of sixteen years.

The father now applied for an order of certiorari to bring up and quash that order on the grounds (1.) that the Sandbach justices were not the justices having jurisdiction under the Guardianship of Infants Acts to hear the mother's application for custody, and (2.) that, in any event, justices had no jurisdiction to make an order regarding the custody of a child living abroad.

P. M. Blomefield for the father. The Sandbach justices were not the justices having jurisdiction under the Guardianship of Infants Acts to hear the mother's application for custody. Section 9 of the Guardianship of Infants Act, 1886, defines " court " for the purpose of the Act as " in England the High Court of " Justice or the county court of the district in which the respon- " dent . . . may reside ", and that section made a similar provision for Ireland and Scotland. The principle is that in the case of local courts the proper venue is the place where the respondent resides. Other similar Acts, such as the Bastardy

Acts and the Summary Jurisdiction (Married Women) Acts, specifically state the venue where it is to be other than the place where the complaint arises. Either (1.) s. 7 of the Guardianship of Infants Act, 1925 (which provides that for the purposes of the Act of 1886 as amended by that Act " the expression ' the court ' " shall include a court of summary jurisdiction "), has the effect that s. 9 of the Act of 1886 reads " or the county court or court " of summary jurisdiction of the district in which the respondent " . . . may reside ", or (2.) the venue is local, which is the rule for determining the jurisdiction of justices, according to where the offence or cause of complaint arises.

As regards proposition (2.), the cause of complaint in the present case is either the child, who is in Northern Ireland, or its custody, which is at common law vested in the father at his place of residence, or the failure of the father to maintain the child. Failure to maintain a wife may arise in a case of husband and wife either where the wife or where the husband resides: *Clarke* v. *Clarke* (1). Similarly in the present case the failure to maintain the child may arise either where the child resides or where the father resides, but not where the mother resides.

Whether proposition (1.) or proposition (2.) is the correct one Sandbach justices had no jurisdiction in the present case.

In any event justices in England have no jurisdiction to adjudicate on the custody of a child residing in Northern Ireland. The Act of 1925 does not apply to Northern Ireland: s. 11, sub-s. 4. Justices have no jurisdiction at common law in matters relating to the guardianship of infants, but only such jurisdiction as is conferred on them by statute. It is conceded that the High Court has jurisdiction to make an order as to the custody of a child out of its jurisdiction, but that jurisdiction is very sparingly exercised: see *per* Lord Merriman, P., in *Harris* v. *Harris* (2). There is nothing in the Guardianship of Infants Acts which suggests that the legislature intended to give to justices jurisdiction where the child was out of the country, in which case even the jurisdiction of the High Court is very sparingly exercised. The High Court has jurisdiction as a supervisory court only in England and Wales; and a court of summary jurisdiction therefore has no jurisdiction to make an order as to the custody of a child in Northern Ireland. There is no means of enforcing such an order. The Maintenance Orders (Facilities for Enforcement) Act, 1920, would not apply. Orders of a court of summary jurisdiction for the payment of money under the Guardianship of Infants Acts are enforceable under s. 53 of the Children Act, 1948, and orders as to custody under s. 7, sub-s. 5, of the Act of 1925; neither of those Acts applies to Northern Ireland.

(1) [1943] P. 1.

(2) [1949] 2 All E. R. 318, 322.

H. J. I. Summerfield for the mother. The appropriate justices have jurisdiction to make an order as to the custody of a child notwithstanding that it is living abroad. The forum of the place of domicile of the father has a pre-eminent jurisdiction in matters relating to the custody of a child; *M'Lean* v. *M'Lean* (3). The dictum of Lord Merriman, P., in *Harris* v. *Harris* (4) makes it clear that an English court may have jurisdiction although the child is abroad.

[LORD GODDARD, C.J. But how can an order committing the custody of a child who is abroad to the mother be enforced?]

While the father is in England the order can be enforced on his person.

[LORD GODDARD, C.J. But how is it to be enforced if he goes abroad?]

The courts of the place where the child is living will enforce the order: see *Nugent* v. *Vetzera* (5), which is the converse of the present case. There the decision of a foreign court as to the guardianship of a child was enforced in England; the decision of an English court would receive like respect in Northern Ireland.

The Sandbach justices were justices with jurisdiction under the Guardianship of Infants Acts to make the present order. Section 7, sub-s. 1, of the Act of 1925, provides in effect that the court having jurisdiction "shall include a court of summary "jurisdiction", not "the court of summary jurisdiction".

[LORD GODDARD, C.J. Which court of summary jurisdiction then has jurisdiction?]

Inferior courts usually have jurisdiction if the question at issue arises in their venue. In the present case the mother is short of money where she resides, and it is there that she is deprived of the custody of her child. I agree that the venue is usually the place where the cause of "complaint" arises. Here the complainant is the mother and the cause of complaint is that she is the mother. Section 7, sub-s. 1, of the Act of 1925 means either (1.) that *any* court of summary jurisdiction has jurisdiction; or (2.) that the court of the place where the subject-matter of the complaint arises has jurisdiction; here the subject-matter of the complaint is quite clearly that the complainant is the mother.

Blomefield replied.

Cur. adv. vult.

July 26. LORD GODDARD, C.J., delivering the judgment of the court, said: The ground on which leave to move for the order

(3) 1947 S. C. 79.
(4) [1949] 2 All E. R. 318, 322.
(5) (1866) L. R. 2 Eq. 704.

had been given was that the petty sessional division in question was not a proper venue for the making or hearing of the complaint, and that the justices had no jurisdiction to hear it or make the order. Objection seems to have been taken before the justices to their jurisdiction both on the ground that the child was living out of the jurisdiction of the English courts, and alternatively that the court in Cheshire was not the appropriate court in England to which jurisdiction had been given under the Guardianship of Infants Acts.

The first Act which it is necessary to consider is the Guardianship of Infants Act, 1886, which by s. 5 provides: " The court " may, upon the application of the mother of any infant . . . " make such order as it may think fit regarding the custody of " such infant and the right of access thereto of either parent, " having regard to the welfare of the infant, and to the conduct " of the parents, and to the wishes as well of the mother as of " the father, and may alter, vary, or discharge such order on the " application of either parent ". Section 9 provides that " the " expression ' the court ' shall mean—in England the High Court " of Justice or the county court of the district in which the " respondent or respondents or any of them may reside ". The Guardianship of Infants Act, 1925, is by s. 11, sub-s. 2, to be construed as one with the Act of 1886, and provides, by s. 3, sub-s. 2, that where the court makes an order giving the custody of the infant to the mother under s. 5 of the Act of 1886, " the " court may further order that the father shall pay to the mother " towards the maintenance of the infant such weekly or other " periodical sum as the court, having regard to the means of " the father, may think reasonable ". Section 7, sub-s. 1, states: " For the purposes of the Guardianship of Infants Act, 1886, " as amended by this Act, the expression ' the court ' shall " include a court of summary jurisdiction. . . . "

The question therefore arises whether, when an application is made to justices for the purpose of obtaining the custody of an infant, the parent applying can apply to any court of summary jurisdiction, or whether the application must be made to the court for the district in which the respondent resides. By the statutory rules made under the Acts these proceedings are to be begun by complaint, and s. 1 of the Summary Jurisdiction Act, 1848, provides: " Where a complaint shall be made to any " such justice or justices upon which he or they have or shall " have authority by law to make any order for the payment of " money or otherwise . . . it shall be lawful for such justice " or justices . . . to issue his or their summons directed to such " person, stating shortly the matter of such information or com" plaint, and requiring him to appear " before them. So far as this section is concerned, it has to be borne in mind that the jurisdiction of a justice is purely local. There are, no doubt, certain statutory provisions with regard to offences committed outside or on the borders of counties or other jurisdictions, but generally speaking the matter of a complaint must be alleged to have arisen within the limits of the justices' local jurisdiction. In cases such as this, concerning the guardianship of infants, it is difficult if not impossible to say that the cause of complaint arose in any particular place. This, no doubt, is why the Act of 1886 expressly provided that the county court for the district in which the respondent resided was the court which should have jurisdiction if application was not made to the High Court. Moreover, the general policy of the County Courts Acts is that proceedings should be taken in the district in which the defendant resides.

There is certainly nothing to bring this case within the jurisdiction of justices in Cheshire except the fact that the mother lives in Cheshire. The child is in the custody of someone in Northern Ireland, and the father lived in Oxfordshire when the proceedings began.

The Guardianship of Infants Acts, 1886 and 1925, as I have already said, have to be read together, and it seems to us, therefore, that, as the effect of the statute of 1925 is to provide another inferior court as one of the courts to which application can be made, we ought to read s. 9 of the Act of 1886 as now providing that "the expression 'the court' shall mean in "England the High Court of Justice, or the county court or court "of summary jurisdiction acting in and for the district in which "the respondent . . . may reside". It would indeed be a strange state of affairs if, recourse being had to the county court, it must be to the county court of the respondent's district, whereas, if resort is had to justices, an application can be made to any bench in any part of England. In our opinion, the intention of the Acts is that proceedings other than any taken in the High Court must be brought where the respondent lives and not where the applicant lives, and for these reasons the Sandbach justices in Cheshire had no jurisdiction to make the order.

The other point argued is, perhaps, of more general importance, and the court should express an opinion on it, because the result of our decision may only be that the mother will now apply to the Berkshire justices, the father now being resident in Berkshire. The question is whether or not a court can make an order relating to the custody of an infant at a time when the infant is outside the jurisdiction. This question not infrequently comes before the Probate, Divorce and Admiralty Division on applications for custody and there, when custody is given, it is the common practice to insert in the order a provision that the parent to whom custody is given is not to take the child out of the jurisdiction of the court without permission. In *Harris* v. *Harris* (6) the President said: "It is the rarest possible thing "for a judge of this Division of the High Court to make a custody "order in respect of a child who is out of the jurisdiction". But, as Mr. Summerfield contended, the words of the President would imply that the court had jurisdiction to make the order though it would very rarely exercise it. He also referred us to a decision of the Court of Session, *M'Lean* v. *M'Lean* (7), and undoubtedly the court there decided that they had power to make the order as both the parents were domiciled in Scotland although the child was living in England outside their jurisdiction.

In view of that case, and of the expression of the President's opinion already quoted, we think that we must take it that the court has jurisdiction to make such an order though it would be very unusual to do so, and in many cases a most undesirable thing, more especially for justices, to make it. It is a strong thing for a court of summary jurisdiction to make an order which the High Court makes only in most exceptional circumstances. The reasons why this should not be done are many. In the present case, suppose the father had made the application and the custody had been committed to him. How could it be enforced? The child is living in Northern Ireland in the actual custody of a person who is not before the court. If that person refused to give up the child, we know of no means by which the English court could enforce its order. Habeas corpus proceedings would have to be brought in Northern Ireland. If the mother took active steps to prevent the child being brought over, she might, no doubt, be punished under s. 34, sub-s. 2, of the Summary Jurisdiction Act, 1879, but only if she still remained within the jurisdiction and so was amenable to the statute. Moreover, provisions are made by s. 5 of the Act of 1886 for altering, varying or discharging an order for custody, and the court might exercise such powers if it were satisfied that the parent to whom the custody had been entrusted was not fulfilling his or her duties as guardian properly. It is obvious that, if the child remained out of the jurisdiction, great difficulties in the way of the court's exercising jurisdiction or being informed of matters relating to the conduct of the guardian would arise. Moreover, provision is made for the court to give access to the parent who is deprived of the guardianship, and in this case, indeed, the justices have given the father access to the child once a week, which would be purely illusory so long as the child remained in Northern Ireland.

Such considerations as these show, we think, how very slow justices should be in making an order in respect of an infant

---

(6) [1949] 2 All E. R. 318, 322.

(7) 1947 S. C. 79.

1950

REX
v.
SANDBACH
JUSTICES.
Ex parte
SMITH.

who is not within the jurisdiction when they are asked to act. By jurisdiction, I mean within the jurisdiction of the English courts. I am not referring to the local jurisdiction of the justices, but where the writ of habeas corpus will run. If the child is brought within the jurisdiction, no difficulty will arise.

Certiorari can only be granted if a court acts without jurisdiction, and proceedings by way of certiorari cannot be used as a method of appeal. While, therefore, we cannot grant an order of certiorari on the ground that the child was out of the jurisdiction when the order was made, however much we may disapprove of an order being made in such circumstances, the order will go on the other ground—namely, that justices in Cheshire had no jurisdiction to make an order as the respondent (the father) was not resident in the district for which they acted.

Order of certiorari.

Solicitors: *Stafford Clark & Co., for Soames & Welch, Burford; Boxall & Boxall, for Norris & Mellor, Stoke-on-Trent.*

R. F. C.

1950
July 14.

Lord Goddard C.J., Hilbery and Byrne JJ.

DUNCAN *v.* GRAHAM AND OTHERS.

Merchant shipping—Passenger steamer—Steamer carrying more than twelve passengers—Necessity for survey and certificate—Fishing vessel gratuitously carrying visitors to warship—Whether a passenger steamer—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 267 and 271.

By s. 271 of the Merchant Shipping Act, 1894: "Every "passenger steamer" (including, by s. 743, a ship propelled by mechanical power) "which carries more than twelve passengers "shall (a) be surveyed . . . and (b) shall not ply or proceed to sea "or on any voyage or excursion with any passengers on board " . . ." without a certificate of survey, subject to a penalty.

A "passenger steamer" within the meaning of that section is one which is constructed for the purpose of carrying more than twelve persons or is habitually or substantially used for that purpose; and an offence is committed if such a steamer goes to sea with any passenger on board unless duly certified as required by the Act.

Where, however, a motor fishing vessel was used to carry persons gratuitously on one occasion on a visit of a warship.

Held, that the vessel was not a passenger steamer within the meaning of the section, and no certificate of survey was required on account of that voyage.

Case stated by the Recorder of Berwick-on-Tweed.

Informations were preferred by C. C. Duncan, a senior marine superintendent employed by the Ministry of Transport, against Janet Graham and Peter Struthers, who were respectively the owner and master of a ship called the *Dolly Graham*, and against the Tweed Fishing Co. Ld., the owners of a vessel called *The Tweed*. The informations charged the defendants with carrying passengers on the ships at Berwick-on-Tweed, when they had not been certified or surveyed by the Board of Trade, contrary to s. 271 of the Merchant Shipping Act, 1894, and s. 21 of the Merchant Shipping Act, 1906. The informations were heard together, the justices fined each of the defendants £10, and they appealed to quarter sessions.

At the hearing of the appeal by quarter sessions, the following facts were proved or admitted:—On June 12, 1949, H.M.S. *Diadem* paid a visit to Berwick-on-Tweed, and the defendants, who held no certificates with reference to the vessels in question granted the use of them for the purpose of carrying members of the public to visit the *Diadem*. The *Dolly Graham* carried at least thirty persons to and from the ship. No payment was made for the journey by any person so carried, and the crew of that vessel received no wages for the journeys in question. The owners of *The Tweed* granted the use of it to persons invited by the Sheriff of Berwick-on-Tweed in the course of civic functions in connexion with the visit of H.M.S. *Diadem*. *The Tweed* carried some hundred persons in addition to the master and crew, and, as in the case of the *Dolly Graham*, no payment was made by the persons carried and the crew received no wages for the journeys.

Both the *Dolly Graham* and *The Tweed* were motor fishing vessels and had not been used for the carriage of persons other than the master and crew before June 12, 1949. There was no indication that they were intended, or were likely, to be used for the carriage of persons after that date.

The recorder held that the two vessels were not passenger steamers within the meaning of ss. 267 and 271 of the Merchant Shipping Act, 1894 (1), and that the persons carried on them were

---

(1) Merchant Shipping Act, 1894, s. 267: "For the purposes of this "Part (Part III) of this Act—The "expression 'passenger' shall include "any person carried in a ship other "than the master and the crew, and "the owner, his family and servants "and the expression 'passenger "steamer' shall mean every British "steamship carrying passengers to, "from, or between any places in the "United Kingdom, except steam "ferry boats . . .".

Section 271: "Every passenger "steamer which carries more than "twelve passengers shall—(a) be not passengers within the meaning of s. 267. He accordingly allowed the appeals. The prosecutor appealed.

Pearson, K.C., and *Ashworth* for the prosecutor. The recorder was wrong in holding that the two vessels were not passenger steamers within the meaning of ss. 267 and 271 of the Merchant Shipping Act, 1894. It is submitted that, on the true construction of the latter section, a steamer does not come within its ambit if it never carries more than twelve passengers; but if a steamer, which has not been certified during the last twelve months, carries more than twelve passengers, an offence under the section has been committed. There has been some difference of judicial opinion as to the meaning of the words " carried ", " carrying " and " carries " which appear in ss. 267 and 271. Five possible meanings have been suggested: (1.) carries simpliciter, that is to say, carries in the particular case concerned; (2.) equipped for carrying; (3.) regularly carries; (4.) carries for reward; and (5.) carries as a matter of business. It is submitted that (1.) is the proper meaning to be attached to it, and that view is consistent with, and derives support from, the decision in *Rex* v. *Fox* (2).

The question whether the persons carried in the present case were " passengers " and the ships " passenger steamers " must be decided by applying the statutory definitions which must be construed quite literally according to the natural meaning of the words used. If that is done the words " carries ", " carried " or " carrying " should have the same meaning throughout in the relevant portions of the Act. In the definition of passengers, " carried " clearly means carried on the particular occasion and in the particular case, whether as a matter of business or pleasure or out of kindness of heart or for any other reason whatsoever, and it should be given the same meaning in the other two places in which it is used. That interpretation gives a perfectly reasonable meaning to the statutory provisions. So long as a ship does not carry more than twelve passengers, she does not need to be surveyed or certified, but if on any occasion she carries more than twelve passengers an offence is committed unless she has been surveyed and certified within the last twelve months. [They also

---

" surveyed once at least in each year " in the manner provided in this " Part of this Act; and (b) shall " not ply or proceed to sea or on " any voyage or excursion with any " passengers on board, unless the " owner or master has the certificate " from the Board of Trade as to sur- " vey under this Part of this Act, " the same being in force, and applic- " able to the voyage or excursion on " which the steamer is about to " proceed ".

Section 743: " Any provisions of " this Act applying to steamers or " steamships shall apply to ships " propelled by electricity or other " mechanical power . . .".

(2) (1925) 21 Ll. L. R. 72.

referred to *Kiddle* v. *Kidston* (3), *Hedges* v. *Hooker* (4) and *Yeudall* v. *Sweeney* (5).]

Hinchcliffe, K.C., and *J. H. Robson* for the defendants. The decision of the recorder was right, since neither of the fishing vessels concerned ever became a passenger steamer to which s. 271 applied. The expression in that section " Every passenger " steamer carrying more than twelve passengers " cannot be intended to mean any steamer which, on one occasion, carries more than twelve persons. The section, properly construed, is describing a particular class of vessel, namely, a passenger steamer, which as a matter of business or of habitual practice carries more than twelve or is constructed for that purpose. If a steamer comes within the words " Every passenger steamer which carries more " than twelve passengers " an offence is committed if one passenger is carried, unless the vessel has been certified.

In all the cases to which reference has been made, the judges held that it was a question of fact whether a steamer was a passenger steamer or not. In *Young* v. *Docherty* (6) Lord Sands said that the definition in s. 267 meant " Every British steamship " carrying passengers . . . as a matter of business either usually " or on a particular occasion, and that the mere incidental " presence on board a ship on a particular occasion of one person, " or it may be of more than one person, other than those excepted " in the clause dealing with ' passenger ', does not make a ship a " passenger steamer ". In the present case, it is submitted, the recorder was clearly right in his decision, since it is plain that the fishing vessels concerned never began to be passenger steamers within the meaning of the section.

Pearson, K.C., in reply.

LORD GODDARD, C.J., stated the facts and continued:—The informations which were laid against the defendants alleged that they being the owners (or in the case of the second defendant the master) of a ship " did carry passengers thereon at Berwick-on- " Tweed when the same had not been surveyed and certified by " the Board of Trade contrary to the Merchant Shipping Act, 1894, " s. 271 and the Merchant Shipping Act, 1906, s. 26 ". I do not want to go at any length into the question whether the informations were properly framed. I do not think that they were, since they contain no allegation that the vessels in question were passenger ships or that they had more than twelve passengers on board. I think, however, that the material sections of the Act clearly show what was the substance of the offence that was alleged. [His Lordship read ss. 267, 271 and 743, and continued:—]

---

(3) (1884) 14 L. R. Ir. 1.
(4) (1889) 60 L. T. 822.
(5) 1922 S. C. (J.) 32.
(6) 1929 S. C. (J.) 57.

The recorder, who stated the case extremely clearly, has found that the two vessels in question were not passenger steamers within the meaning of the sections. He has also found that the hundred or so persons who were carried in these vessels on the particular day paid nothing for the privilege of being carried, paid no fare, and gave no remuneration to anybody; though in the view which I take of this case that is not the material point.

It is said here, and at first I was attracted by Mr. Pearson's argument, that once it is shown that there are passengers on board a ship, she thereby becomes a passenger ship; and that, if there are more than twelve passengers on board an offence is committed if she goes to sea without the certificate of the Board of Trade. Mr. Hinchcliffe's argument, however, has satisfied me that the first opinion which I formed was wrong, and I am now quite convinced that the recorder was right in the judgment which he gave.

It seems to me that, bearing in mind that this section concerns passenger and emigrant ships, and that s. 267 provides that the expression "passenger steamer" means every British steamship carrying passengers, the court must first apply its mind to the question whether the ship can properly be called a passenger ship. The words in s. 267 are "carrying passengers", and that seems to point to the fact that the ship must be one that is either constructed to carry passengers or is used for the carriage of passengers, not a ship which, although a cargo ship or a fishing vessel, may on some particular occasion take persons for a trip down the river, for example. In s. 271 there are the words "Every passenger steamer which carries more than twelve "passengers shall (a) be surveyed once at least in each year in the "manner provided in this Part of this Act; and (b) shall not "ply or proceed to sea or on any voyage or excursion with any "passengers on board", unless she has a certificate. Mr. Pearson invited us to say that that was a piece of careless drafting, and that what it meant was that no passenger steamer should go to sea with more than twelve passengers on board without a certificate; but that is not what the section says: it begins: "Every "passenger steamer which carries more than twelve passengers "shall . . . not ply or proceed to sea or on any voyage or excursion "with any passengers on board". That seems clearly to point to the fact that the first thing to find out is whether the vessel is a passenger steamer carrying more than twelve passengers—not carrying more than twelve passengers on some particular day: she has to be a passenger steamer, and that may be establised by showing either that she is a steamer constructed to carry passengers, such as an excursion steamer, or that she is a steamer which is ordinarily engaged in transporting passengers from place to place, or that she is being habitually used as a passenger steamer as a matter of business or of ordinary use.

The point is not without authority. The first case to which our attention was called, *Reg.* v. *Dublin Justices* (7), was an Irish case decided in 1884. It cannot, I think, be regarded as a wholly satisfactory authority, at any rate, in this court. It was a decision of two judges against one. O'Brien J. delivered a very strong dissenting judgment, and, although there are many passages in his judgment with which I should find it difficult to agree, I think that the weight of his argument was very much on the lines of Mr. Hinchcliffe's argument before us today. That case was considered by this court in 1889 in *Hedges* v. *Hooker* (8), a case singularly like the present; in fact it is difficult to distinguish between them. The facts, as stated in the headnote were that more than twelve persons were taken on board the steamer for an excursion down the River Orwell to Felixstowe and back. No charge was made by the respondents for the use of the steamer, but a gratuity was given to the master and crew. The ship had been lent for the purpose of taking a choir for an outing.

Lord Coleridge, C.J., in his judgment, did not rely entirely, as did Hawkins, J., on the fact that it could not be said that the vessel was plying for hire. Lord Coleridge, C.J., said (9): "The "justices set out all the facts, and then say that these persons "were passengers within the meaning of s. 303 of the Merchant "Shipping Act, 1854. It is impossible to define exactly what "constitutes a passenger steamer. Each case must stand on its "own circumstances. For instance, take the case where a "gentleman takes a party on his steam yacht up and down a "river. I should say that such a case was too clear for argument. "In the present case the respondents are the owners of a steamer "on which they take a number of boys and girls who form a choir "down the river for a trip and bring them back again, and they "charge nothing for the use of the steamer. The question in the "case is, whether the vessel was a passenger steamer, and these "persons who were on board were passengers within the meaning "of the Merchant Shipping Act, 1854, s. 303, which says that: "'The word "passengers" shall be held to include any persons "'carried in a steamship other than the master and crew, and the "'owner, his family and servants; and the expression "'"passenger steamer" shall be held to include every British "'steamship carrying passengers to, from, or between any place "'or places in the United Kingdom, excepting steam ferryboats "'working in chains, commonly called steam bridges'. I think "the sort of thing done here was not pointed at by the Act of

---

(7) (1884) 15 Cox C. C. 379.

(8) 60 L. T. 822.

(9) Ibid. 823.

"Parliament, and that it would be straining the Act to "include it".

He then went on to say that they were not plying, and I notice that he approves the judgment of O'Brien, J., who was the dissenting judge in *Reg.* v. *Dublin Justices* (10). It will be observed that Lord Coleridge, C.J., was obviously saying that the first consideration to which one must apply one's mind is whether this vessel in question can be called a passenger steamer, not merely by a narrow reference to the definition section of the Act; for, as Hilbery, J., pointed out in the course of the argument, the participle "carrying" in the section is used for an express purpose, namely, to show that the vessel is one whose business, or whose habitual use, is for the carriage of passengers.

There are other cases to which we have been referred, including two in the Court of Justiciary in Scotland, the first being *Yeudall* v. *Sweeney* (11). It was there held "that the word 'carries' does "not mean 'is fitted to carry' but 'in fact carries'; and, "accordingly, that a complaint which merely set forth that a "passenger steamer, for which no certificate had been obtained, "had, on a specified occasion, carried more than twelve passengers "was relevant". I do not think that the judgments in that case were really aimed at the point which we are now considering.

In *Young* v. *Docherty* (12) the facts were very much the same as in the case before us. There, the use of an ordinary motor boat had been granted to some sea cadets, and it went from Greenock to Roseneath. The ship had not the necessary certificate, and the boys paid 1d. towards the cost of the fuel, although no consideration was paid to the defendant for the use of the boat. The sheriff-substitute dismissed the charge, and his decision was upheld. The Lord Justice-General said: "I am not prepared, on the facts "before us in these cases and on the argument presented, to lay "it down either expressly or by implication that, if the owner of a "pleasure steam-vessel asks a party of friends, numbering more "than twelve, to join him in a trip on the Clyde—say, from "Greenock and back—his vessel becomes a 'passenger steamer' "and his friends 'passengers' within the meaning of the Act to "the effect of requiring him to qualify and apply for the statutory "certificate. But this would be the result of affirming the prose"cutor's bare argument on the terms of the Act". Then he says: "For these reasons I think the sheriff-substitute was right in "thinking that there were not sufficient materials before him to "entitle him to hold that the motor-boats in question were "'passenger steamers' within the meaning of section 271". No doubt, in that case, exactly as in this case, there were persons on board who could be called passengers; but evidently in the opinion of the Lord Justice-General that was not enough: it had to be shown that the vessel was a passenger steamer properly so-called.

---

(10) 15 Cox C. C. 379.
(11) 1922 S. C. (J.) 32.
(12) 1929 S. C. (J.) 57, 61.

In the same case Lord Sands said (13): "And in order that the prosecutor may succeed in this case it is necessary that he should show that the vessels here in question were passenger steamers. Now, to succeed in that contention he must show that the clause may be thus paraphrased: 'The expression "passenger steamer" shall mean every British ship having for the time being on board, even incidentally, one person who is other than the master and crew or the owner and his family and servants on its way to or from places in the United Kingdom'. Now, that is a construction which would lead to results so extravagant that one would hesitate to adopt it unless one were constrained to do so. I do not think we are so constrained. I think that, when we have regard to the whole context of the Act and the scope of its different parts and provisions we may fairly read the definition 'passenger steamer shall mean every British steamship carrying passengers to, from, and between any places in the United Kingdom' as meaning that every passenger steamer shall mean every British steamship carrying passengers to, from, and between any places in the United Kingdom as a matter of business either usually or on a particular occasion, and that the mere incidental presence on board a ship on a particular voyage of one person, or it may be more than one person, other than those excepted in the clause dealing with 'passenger', does not make a ship a passenger steamer".

Contrast that case with *Rex* v. *Fox* (14), to which we were referred by Mr. Pearson. The facts there were, to quote the headnote: "Messrs. Fox & Co. were a well-known and reputable firm of shipping agents in Falmouth, and were agents to the Canadian Pacific Liners. Messrs. Fox had been using a tug of their own for the purposes of conveying from the shore to the ship members of the crew of the liners when in Falmouth Harbour. As there was not sufficient life-saving apparatus on board, and for other reasons, the Board of Trade thought they were contravening this section of the Act because the tug was not certified as a passenger steamer. In these circumstances, on March 18, the *Durgan* was noted to have on board for the purpose of taking back, late at night, to the *Empress of Scotland* a number of the crew, in all some fifty-one or fifty-two persons, in addition to the tug crew", and accordingly a summons was issued. There it was clear that the vessel had been habitually used by Messrs. Fox for the purpose of taking the members of the crew of Canadian Pacific ships out to the ships which, I suppose, were lying in the Carrick Roads.

---

(13) 1929 S. C. (J.) 62.

(14) (1925) 21 Ll. L. R. 72.

The justices dismissed the summons for reasons which are not clear, but the Divisional Court reversed their decision, the Lord Chief Justice saying (15): " That section provides that for the purpose of Part III of the Act the expression ' passenger ' shall include any passenger carried in a ship other than the master and crew and the owner, his family and servants. It is quite obvious that that means other than the master and crew of that ship; so that it does not mean that a person who is a member of the crew of one ship is thereby prevented from being a passenger upon any other ship ". Then he goes on to deal with the argument that those persons were not passengers but crew, and says: " Some doubt seems to have been thrown on the matter by the decision in *Hedges* v. *Hooker* (16), but that decision turned on the special facts of the case ". The special facts in *Hedges* v. *Hooker* (16) seem very near to the special facts in this case.

I have come to the conclusion without any hesitation that it is not possible to make sense of s. 271 unless the words " every passenger steamer which carries more than twelve passengers " are read as meaning that the steamer must first be a passenger steamer, that is to say, one that is used either habitually, or at any rate substantially, for carrying passengers or is constructed as a passenger steamer; otherwise, I cannot make the section read grammatically or even in such a way as to make sense. When it says: " every passenger steamer which carries more than twelve passengers shall not proceed to sea . . . with any passengers ", it seems to me clear that it must be shown that the vessel is a passenger steamer quite apart from the fact of whether she has twelve passengers on board or more. She has first to be a passenger steamer; then, if she has more than twelve on board, she must not go to sea with any passengers unless she has a survey certificate; but she must be a passenger steamer which carries more than twelve passengers; in other words, she must be a steamer constructed or used for the purpose of carrying more than twelve.

In this case the recorder, who was clearly entitled to find whether these ships were passenger ships or not, has found that they were fishing boats. In so holding, I think he came to the same conclusion as the Court of Session in *Young* v. *Docherty* (17), and I, therefore, think that it is impossible to interfere with this finding and that the appeal accordingly fails.

HILBERY, J. I was at first attracted by the argument for the prosecutor; but, like my Lord, I am unable to make sense of s. 271

---

(15) Ibid. 72.
(16) 60 L. T. 822.
(17) 1929 S. C. (J.) 57.

1950

DUNCAN
v.
GRAHAM
AND
OTHERS.

Hilbery J.

unless that construction is given to the meaning of the words "passenger steamer", which he has said is the proper construction. I agree with his judgment.

BYRNE, J. I agree.

Appeals dismissed.

Solicitors: *Treasury Solicitor; Keenlyside & Forster, Newcastle-on-Tyne.*

P. B. D.

YATES *v.* MORRIS.

[Plaint No. F 567.]

C. A.

1950
July 14.

Evershed M.R., Singleton and Jenkins L.JJ.

Landlord and tenant—Rent restriction—Tenant permitting premises to be used for immoral purposes—Discretion of court to grant landlord possession—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 5, *sub-s.* 2, *as substituted by Rent and Mortgage Interest Restrictions Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 4—*Rent and Mortgage Interest Restrictions (Amendment) Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *Sch. I, para.* (*b*).

On the application of a landlord of premises within the Rent Restriction Acts for possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch. I, para. (*b*), on the ground that the statutory tenant has allowed the premises to be used for an immoral purpose, the county court judge found that the statutory tenant had permitted the premises to be used by prostitutes and made an order for possession in twenty-eight days but he suspended the operation of the order indefinitely "provided no further nuisance occurs".

Held, that, although, prima facie, when such facts were proved the county court should act on the principles applied by the courts when considering an application by a tenant under s. 146 of the Law of Property Act, 1925, for relief against forfeiture in a similar case, and make an order in favour of the landlord, yet the county court had a discretion in the matter and the Court of Appeal would not interfere with the exercise of that discretion: and held further by Evershed, M.R. and Jenkins, L.J., Singleton, L.J., dubitante, that the county court judge had jurisdiction under s. 5, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1920, as substituted by s. 4 of the Act of 1923, to suspend the operation of the order for possession indefinitely.

Sheffield Corporation v. *Luxford* [1929] 2 K. B. 180 distinguished.

C. A.
1950

YATES
v.
MORRIS.

APPEAL from Judge Drucquer, sitting at Westminster County Court.

By a lease dated July 5, 1943, No. 14 Hugh Street, Westminster, was demised to C. H. C. Bond. The premises were within the Rent Restriction Acts. The lessee sub-let them in 1943 for a term expiring on June 25, 1948. In 1944 the defendant Lily Morris (hereinafter called "the tenant") went into possession as assignee of the sub-lease and when it expired she continued in possession as statutory tenant. On June 17, 1949, the lessee assigned the head lease to the plaintiff R. C. M. Yates (hereinafter called "the landlord"). The landlord served notice to quit on the tenant expiring on November 12, 1949, and in these proceedings he claimed possession under para. (*b*) of Sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.

The following facts were found by the county court judge:— The tenant earned her living by sub-letting rooms, and she had spent from 400*l.* to 500*l.* on doing up the premises for that purpose. In 1945 questions were raised about the use being made of the premises, and in 1948 the tenant was warned by the police on behalf of Westminster Corporation. In September, 1949, the house was kept under observation by a police officer. On three successive days, he said, he saw a woman called Clarke, who was a known prostitute, take, in all, sixteen men into the house. When the tenant was warned, she got rid of Clarke, who had been sub-tenant of one of the rooms. In April, 1950, after the present proceedings had been started, the house was again watched by the police, and it appeared that one Sally Waters, who was known as a common prostitute, was seen over a period of three days taking twelve different men into the house. Sally Waters was not a sub-tenant of any part of the premises, but she was a friend of the tenant, who had given her a key to enable her to use the telephone.

The county court judge made an order in the following terms:—"Judgment for possession in twenty-eight days. Suspended provided no further nuisance occurs".

In the course of his judgment he said he had grave doubts whether he should exercise his discretion to postpone an order for possession. He said that he had been moved to do so by the following considerations: "I am satisfied that when complaint "was made in 1948 and 1949, the tenant immediately evicted "the offending person. I accept the evidence that there were "grounds of complaint in 1945, but, apart from that, there is not "much, if any, evidence that the neighbourhood was disturbed "by the conduct of the house. I think the tenant did her best "to prevent the nuisance. As regards Waters, she said she "knew nothing about her conduct, but it cannot be overlooked "that she allowed her a key of the house. The tenant . . . had "permission to sub-let her rooms to provide a living for herself. "She invested her all in the premises, a sum of 300*l.* or 400*l.*, "she states, in improving the premises for that purpose. The "predecessor in title of the present landlord had been from time "to time on the premises. He had no ground for complaint "against her. The names of her sub-tenants have been disclosed "to the landlord. Some have been there since 1944, and no "complaint has been received from any of them. I am pre-"pared to give her another chance, but it is a very serious case, "and unless she looks after the property properly she will have "to go. I shall allow her to stay, but it is a very extreme case".

The landlord appealed.

C. G. A. Cowan for the landlord. It is submitted that the county court judge should not have suspended the operation of the order for possession indefinitely. It has been established that the tenant was permitting the premises to be used for immoral purposes. If this were a case under s. 146 of the Law of Property Act, 1925, the court would not grant the tenant relief from forfeiture: see *Borthwick-Norton* v. *Romney Warwick Estates Ld.* (1). It is submitted, first, that the same principle should be applied where a landlord applies under para. (*b*) of Sch. I to the Act of 1933 for possession as is applied in the case of a tenant seeking to take advantage of s. 146 of the Act of 1925. Secondly, it is submitted that the judge had no right to suspend the operation of the order for possession indefinitely: see *Sheffield Corporation* v. *Luxford* (2), a decision on s. 138 of the County Courts Act, 1888, the principle in which nevertheless applies equally to orders under the Rent Restriction Acts. Lastly, to postpone the order for possession indefinitely would be manifestly unjust to the landlord. He is himself a tenant, and, should the head landlord take proceedings to forfeit the lease, the tenant could not claim relief under s. 146 of the Law of Property Act, 1925.

B. St. Q. Power for the tenant, was not called on to argue.

EVERSHED, M.R. This case has caused me very considerable anxiety. Similar problems have recently come before the court in cases under s. 146 of the Law of Property Act, 1925. In those cases the question was whether, when a landlord had forfeited a lease on the ground that there had been a breach of covenant not to use or permit premises to be used for immoral purposes, the tenant could obtain relief against forfeiture. I say that the problems were similar, but in my judgment they were not the same. In forfeiture cases the tenant has committed a breach of contract entitling the landlord according to the contract to forfeit, and the landlord has forfeited and the lease has ended. The question is this: should the court in its discretion relieve the tenant against the forfeiture? It has been laid down many times that such relief will not be granted if the breach is not capable of remedy. In the present case the emphasis is, I think, somewhat different. Where there is a rent-controlled house, and a statutory tenant is the occupant, the court cannot order possession at the suit of the landlord save in certain circumstances. First, it must be shown that some one of the events enumerated in the Act of 1933 has occurred which gives the court jurisdiction to make an order at all, and, second, the court must come to the conclusion that it is reasonable to make the particular order for possession. There is, therefore, a difference in emphasis. Nevertheless, it is to my mind true to say that when the discretion in either kind of case comes to be exercised, it is proper that considerations which are applicable in the one should prima facie be applicable in the other. Thus, in *Borthwick-Norton* v. *Romney Warwick Estates Ld.* (3), Lord Goddard, C.J., in his judgment, said: " The discretion which is given by s. 146, sub-s. 2, of the " Act of 1925 is not to be exercised in favour of people who " suffer premises to be used as a brothel, and the learned judge, " having found that the defendant company was suffering these " premises to be used as a brothel, was justified in refusing to " exercise discretion in their favour ". I observe that there Hilbery, J., had refused to exercise discretion in the tenant's favour, and this court had been asked to reverse his decision.

---

(1) [1950] 1 All E. R. 798.

(2) [1929] 2 K. B. 180.

I have read that passage, and I have made those observations, because to my mind, if premises within the Rent Restriction Acts are proved to be used to the knowledge of the tenant for purposes of this kind, prima facie the court ought not to refrain from making an order for possession. The Acts were designed to protect persons in the occupation of their homes at a time of housing shortage, and if a statutory tenant is shown to be suffering premises to be used for immoral purposes the case is not one which could have been within the protection intended by Parliament. I am therefore inclined to think that, had I been trying this case, I should have been less charitable to the tenant than was the judge below. But I did not see her, and in any question of discretion the importance of having seen the witness cannot be too strongly emphasized.

[His Lordship stated the facts, read the passage from the county court judge's statement, quoted above, and continued:—] I read the findings of the county court judge as amounting to this, that, though he thought that the tenant had not been careful or astute in her observation, he was prepared to believe that she was largely innocent of the use being made of these premises by persons to whom she had let rooms, or whom she had admitted as lodgers. I think that he was also influenced, perhaps, by the fact that the landlord's predecessor had himself not infrequently been on the premises, and, as he stated, had not made any complaints against the tenant. I mention that because Mr. Cowan has said that, since the landlord's head lease contains a covenant as to user, justice requires that he should be protected by an immediate order for ejectment against the tenant, though nobody is suggesting that he is himself using or suffering a user of the premises for immoral purposes. It seems to me plain that, on those facts, the present landlord would be protected by the courts if there were an attempt to forfeit his lease by his head landlord.

---

(3) [1950] 1 All E. R. 798, 801.

In cases such as this, I think, the court should be ready to make immediate orders for possession. I cannot think that, where user of this kind is proved, the premises would be regarded by Parliament as within the protection of the Act. It is, however, a matter of discretion. The judge who tried the case has great experience. I am not persuaded that, either in regard to the application of the *Borthwick-Norton* case (4), or on any other ground, the judge is shown to have misdirected himself or to have so exercised his discretion as to give rise to an injustice against the landlord, or otherwise not to have exercised his discretion judicially. Therefore, I do not, on the whole, think that it would be right for this court to interfere.

Another point was taken by Mr. Cowan, which I will discuss more briefly. He said that the judge, having first of all by the terms of his order said that possession must be given, then had no jurisdiction to suspend, or, if he had, he ought not to have suspended, it conditionally, in effect, on the tenant's taking proper steps to see that there is no further improper use of any room. As far as jurisdiction is concerned, I do not think that the point is open to Mr. Cowan because it was not taken below, and it is not among the grounds of appeal. In any case, I think that there is jurisdiction either under s. 5, sub-s. 2, of the Rent Restrictions Act of 1920, as substituted by s. 4 of the Act of 1923, or otherwise, to make an order in this form in a case arising under the Rent Acts. Whether it is a very convenient form is another matter. The intention of the order clearly is that, should there be any ground for saying that there is still an immoral use of these premises, then (on application to the court, if necessary), the suspension would immediately terminate. As I read the judgment, it would then be no answer on the tenant's part to say that she did not know: she has been told to manage her premises properly. That being the intention of the order, I do not think that there would be any practical difficulty in giving effect to it if occasion should arise, and for the reasons indicated I think that there was jurisdiction to make it. I think the case quite different from *Sheffield Corporation* v. *Luxford* (5), where the Rent Acts were not involved. The plaintiff proved that the lease had determined, and that he was, according to the law of the land, entitled to immediate possession. The question there arose because under the County Court Act, 1888, s. 138, there was a general power for the court to suspend the operation of its order. However, where there is an absolute right to possession, that discretion, if it be exercised judicially, can only be exercised so as to give reasonable opportunity to the trespassing tenant to remove himself and his belongings from the premises. People cannot be expected or reasonably asked to go at two minutes' notice; but to give a twelve months' suspension for no particular reason could not have been a judicial exercise of discretion. That is quite different from the present case, where the making of an order for possession, whether an immediate one, or in six months' time, or suspended indefinitely, is wholly in the discretion of the judge.

---

(4) [1950] 1 All E. R. 798.

That I think is a less troublesome point. The point which has troubled me most is the first. Although I am clear in my mind that prima facie in cases such as this there should be, in effect, immediate orders for possession, I am not prepared to say that we ought in this case to interfere with the discretion exercised by the learned county court judge.

SINGLETON, L.J. I, too, have been greatly troubled by this case. I have felt considerable doubt whether the county court judge has the power to make an order in the terms in which he made it. He found that "the [landlord] is entitled to possession "on these grounds, and I accordingly order possession in twenty-"eight days and give judgment for the rent due up to March 25, "1950". Later in his judgment, having considered the facts further, the judge said, "Judgment for possession in twenty-eight "days suspended provided no further nuisance occurs". The result of that is to make an order for possession in twenty-eight days, but to grant an indefinite suspension of it, so that the latter part of the order stultifies and renders of no effect the former part of it. I doubt whether such an order can be properly made, but I agree, if I may say so, with my Lord that the matter was not pointed out to the judge at the hearing, and that the notice of appeal does not cover that point, so that it may well be that it is not open to this court to interfere on that ground. If that ground goes, the matter becomes simpler. It is a question for the discretion of the county court judge, assuming that he had power to make an order of this kind at all. There again it is only one consideration which enables me to say that this court ought not to interfere, and that consideration is that in virtually every case the county court judge is entrusted with the decision, and final decision, of questions of fact. If this had been a case in which forfeiture was claimed for breach of a covenant under s. 146 of the Law of Property Act, 1925, there would have been no question, as *Borthwick-Norton* v. *Romney Warwick Estates Ld.* (6) shows. But it is not such a case. It is a case under the Rent Acts, and, though the wording of the various Acts brings into play somewhat different considerations, I should not like to think that the practice is wholly different.

---

(5) [1929] 2 K. B. 180.

The facts of this case as found by the judge are clear. [His Lordship referred to them, and continued:] The county court judge has taken a charitable view of the tenant's behaviour. I confess that I could not have looked upon the matter in the same light as he appears to have done. The tenant had been warned, but she continued in the same way. But I recognize, and I hope that I always shall recognize, that the county court judge is the judge of fact, and that this court is bound by the findings of fact if there is any evidence on which he could so find. It is that alone which prompts me to say that I agree that the appeal should be dismissed.

JENKINS, L.J. I also agree that, for the reasons stated by the Master of the Rolls, this appeal should be dismissed. The tenant here has been extremely lucky, and, as at present advised, so far as I can judge from the notes of the evidence, as opposed to seeing and hearing the witnesses, I would not myself, if I had been dealing with the matter at first instance, have been disposed to grant a similar indulgence. But the question whether any, and if so what, suspension of the order should be granted was essentially a matter for the discretion of the county court judge; and, although he has certainly taken a very lenient view, I cannot find that in so doing he has committed any such error in law as would make his order properly open to review in this court. Accordingly, I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Wontner & Son; Piper, Smith & Piper.*

B. A. B.

---

(6) [1950] 1 All E. R. 798.

1950
July 19.

Tucker, Cohen and Asquith L.JJ.

WALTER *v.* ETON RURAL DISTRICT COUNCIL AND OTHERS.

Local government—Superannuation—Employee's claim supported by employing rural district council—Superannuation fund maintained and administered by county council—Claim rejected by administering authority—"Authority concerned"—Local Government Superannuation Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 68), *ss.* 8, 35.

By s. 8 of the Local Government Superannuation Act, 1937, an employee of a local authority is eligible for a superannuation allowance if "he has completed ten years' service and is incapable "of discharging efficiently the duties of his employment by reason "of permanent ill-health or infirmity of mind or body".

Section 35 of the Act provides that "Any question concerning "the rights or liabilities of an employee of a local authority . . . "shall be decided in the first instance by the authority concerned, "and if the employee is dissatisfied with any such decision . . . "shall be determined by the Minister, and the Minister's determination shall be final".

The plaintiff, whose resignation on the ground of ill-health and application for pension had been accepted and approved by his employers, a rural district council, appealed from the rejection of his claim by the county council, the authority responsible for making payments from the superannuation fund.

Held, dismissing the appeal, that in regard to questions arising under s. 8 the county council, as the administering authority, were the "authority concerned", and not the rural district council.

Decision of Lord Goddard, C.J., [1950] 2 K. B. 583 affirmed.

Appeal from Lord Goddard, C.J. (1).

The plaintiff, Edward Frank Walter, was from April, 1930, until July 31, 1947, an employee of the first defendants, Eton Rural District Council. During his employment he contributed to a superannuation fund maintained under the Local Government Superannuation Act, 1937, by the second defendants, Buckinghamshire County Council, on behalf of Eton and some twenty other districts whose local authorities employed fewer than a hundred employees. On May 13, 1947, the plaintiff, who during the war years was said to have suffered considerable strain, in consequence of which his eyesight had become seriously affected, gave notice of his intention to resign his employment on the ground of ill-health, and his resignation was accepted by the rural district council on that footing. He claimed to be entitled to a superannuation allowance under s. 8 of the Act, and on May 27, 1947, the rural district council agreed that he was so entitled.

---

(1) [1950] 2 K. B. 583.

His claim came before the county council, as the authority for making payments from the fund, and that council, after considering medical reports, rejected the claim on the ground that they were not satisfied that the plaintiff was "incapable of "discharging efficiently the duties of his employment by reason "of permanent ill-health or infirmity of mind or body".

The plaintiff accordingly brought the present action claiming a declaration that he was entitled to an annual superannuation allowance under the Act.

On March 13, 1950, Lord Goddard, C.J., dismissed the action. He said that the question was who was the "authority concerned" here within the meaning of s. 35. The contention that it was the authority who had to administer the fund was right. They had to see to the proper application of the fund and to satisfy themselves that an applicant had brought himself within s. 8. Where a dispute arose between the authority and an applicant the question had to be decided by the Minister, whose determination was final. The plaintiff appealed.

Gardiner, K.C., and *Maurice Lyell* for the plaintiff.

Rowe, K.C., *W. L. Roots* and *W. J. Glover* for the defendants.

Eton Rural District Council were not represented and took no part in the appeal.

The arguments of counsel are summarized in the judgments.

TUCKER, L.J., having stated the facts and read the material sections of the Local Government Superannuation Act, 1937, continued:—The question is which is the appropriate authority for determining claims to pension arising under s. 8, sub-s. 1. Is it the administering authority in a case where the administering authority are different from the employing authority, or is it the employing authority? It is argued by Mr. Gardiner for the plaintiff that it is only reasonable to suppose that such matters as decisions with regard to infirmity of mind or body, permanent ill-health and incapability of discharging efficiently his duties, are better determined by the employing authority, who were familiar with the case of the man in question, rather than by some more distant authority who know nothing about the man. I think that there is considerable force in that argument.

On the other hand, it is said that the administering authority in charge of this fund, in which a number of different local authorities are interested, are in the position of a trustee and that they have to be satisfied that the necessary facts are established in each case which will justify them in paying sums out of the fund; and that, if it had been intended that they should merely act as bankers, and pay out on the order of the employing authority, it would have been very easy to say so.

In this case it is not necessary to decide which is "the "authority concerned" under the various sections to which we have been referred: all that we have to decide is which is "the "authority concerned" with the matters covered by s. 8. I think, however, that some light is thrown on these matters by the other sections, or some of the other sections, to which our attention has been called. Mr. Gardiner relied very strongly on s. 3, sub-s. 2. That section concerns persons who are to be contributory employees, and sub-s. 2 provides: "The persons "referred to in the preceding subsection are— . . . (*b*) every "servant, or part-time officer, of such a local authority as afore-"said who belongs to a class or description which the authority "have by a statutory resolution specified as a class or description "the members of, or persons falling within, which are to be "contributory employees". Regulations have been made under that section by the Minister on the basis that "the authority "concerned" with creating this class are the employing authority, and reg. 5 of the regulations in terms covers that matter.

Mr. Rowe concedes that, having regard to the regulations which have been made, the employing authority are the person charged with that duty. Whether he would have so conceded but for these statutory rules and orders which have been made under that section, I know not; but, for present purposes, I am prepared to assume that the regulations were properly made allocating these duties to the employing authority. We were then also referred to s. 6 of the Act, and particularly to sub-s. 5, which provides: "If, in consequence of his incapacity to continue "to discharge efficiently the duties of his post, a contributory "employee is transferred to another post at a reduced remunera-"tion, or otherwise suffers a reduction of remuneration, he shall "be entitled to continue to contribute to the superannuation fund "the like amount as if his remuneration had not been reduced". Mr. Gardiner argues that that, again, is a matter more appropriately within the competence of the employing authority.

Whatever may be the correct view of that matter, I pass to s. 10, sub-s. 2, which provides: "A contributory employee of "an employing authority who, before becoming entitled to a "superannuation allowance under this Part of this Act, ceases "to be employed by them by reason of his voluntary resignation, "or his resignation or dismissal in consequence of inefficiency, "shall be entitled to receive out of the appropriate superannuation "fund a sum equal to the aggregate amount of his contributions "to the fund". That is to be contrasted with sub-s. 4 of that section, which provides: "Where a contributory employee of an "employing authority ceases to be employed by them in conse-"quence of an offence of a fraudulent character, or ceases to be "employed by them in consequence of misconduct and is not "entitled to a superannuation allowance under this Part of this "Act, the employing authority may, if they think fit, direct the "return to him out of the appropriate superannuation fund of a "sum equal to the whole or a part of the aggregate amount of his "contributions to the fund, or, if he ceases to be employed in "consequence of an offence of a fraudulent character, the payment out of that fund of an equivalent sum to his wife or "family". It is to be observed that under sub-s. 4 the matter is discretionary, whereas under sub-s. 2 the person concerned is entitled in those circumstances to a return of his contributions. Mr. Rowe points out that, in effect, Mr. Gardiner's contention in the present case, and in other cases arising under the sections to which he has referred, is that the function of the administering authority is as provided under sub-s. 4, that is to say, that their duty is merely to pay out on the direction of the employing authority. Mr. Rowe says that if that had been the intention of the legislature it would have been easy to say so, and that when they did so intend, as in the case of sub-s. 4, they said so in clear language.

As I have said, I do not think this matter is by any means free from difficulty; but, having considered the arguments and the sections to which we have been referred, and in particular s. 22, concerning the periodical valuations to be made in connexion with superannuation funds, I have come to the conclusion that Mr. Rowe's argument should prevail. Section 22 provides for quinquennial valuations, for the manner in which actuarial calculations are to be made, and for the consideration of the reports; and sub-s. 6 provides: "Where by any valuation and "report under this section a deficiency or a disposable surplus "is disclosed, the administering authority shall, within three "months after receiving the valuation and report, make a scheme "for making good the deficiency or, as the case may require, for "disposing of the surplus".

Mr. Gardiner has drawn our attention to the provisional regulations, dated March 18, 1939, with regard to those actuarial valuations made under sub-s. 3 of s. 22 of the Act. They provide for the manner in which the actuarial reports are to be made. By reg. 6 (2), "In the report on the first valuation made under "the Act, the statement referred to in para. 1 of this article "shall be supplemented by a statement", and certain matters which have to be certified are set out. By reg. 6 (3): "This "part of the report shall close with a recommendation as to the "aggregate annual amounts which should be paid into the fund "during a period not exceeding forty years from the valuation "date by each authority interested in the fund to meet such "estimated liabilities as are certified under paras. 1 and 2 of this "article to have been imposed on the funds".

C. A.
1950

WALKER
v.
ETON RURAL
DISTRICT
COUNCIL

[illegible], L.J.

Under the heading "Valuation Results", reg. 8 (1) provides: "The following information shall be furnished in the fourth part "of the report— . . . (c) If a deficiency is disclosed, a statement "indicating generally the factors which have caused the deficiency "and a recommendation for the allocation of the deficiency "among the authorities interested in the superannuation fund, "indicating the basis adopted for the proposed allocation and the "manner in which the deficiency should be liquidated."

When these reports have been received and considered, it will remain for the authority to make a scheme for meeting a deficiency under sub-s. 6 of s. 22 of the Act, and, although I have no doubt that in the main the deficiency will normally be allocated to the different authorities proportionate to the claims which have arisen upon the fund from that area, the fact remains that it is one entire fund and that no local authority has any right to any one particular portion of that fund. The local authority have to deal with the fund as trustees, they can only make good the deficiencies which have arisen at the end of the quinquennial period; and, in my opinion, in the meantime, before they authorise the drawing of any cheques on the fund, they have to be satisfied that circumstances have been established which justify their making payments.

In the result, I have come to the same conclusion as the Lord Chief Justice, namely, that, with regard to s. 8 of the Act, "the authority concerned" in this case is the administering authority, namely, Buckinghamshire County Council, and not Eton Rural District Council. For these reasons I think that the appeal must fail.

COHEN, L.J. I am of the same opinion. It was common ground between the parties, first, that the question turns on the meaning of the expression "the authority concerned" in s. 35 of the Local Government Superannuation Act, 1937, and, secondly, that this phrase does not necessarily connote either of the following two authorities, both of which are defined in the Act, first, the employing authority, or, secondly, the administering authority, but that it might be one or the other according to the nature of the question to be decided under s. 35.

Mr. Gardiner said that the Lord Chief Justice rejected the second of these points, and held that "the authority concerned" must in all cases be the administering authority. I do not so read his judgment. Referring to s. 8, and summarising Mr. Simes' argument in the court below, he said (2): "Mr. Simes has "pointed out that s. 8, which prescribes the eligibility of any "particular employee, does not confer any right or duty upon

(2) [1950] 2 K. B. 588.

"anybody to decide anything; it simply says that he has the "right to receive an annual superannuation allowance if certain "conditions are fulfilled, and counsel therefore argues that the "authority who have to pay are the authority who must satisfy "themselves that he has brought himself within the provisions "of s. 8. If he has not done that, the administering authority "cannot pay him; they have the right and the duty to "refuse to pay. If their decision is that he is not entitled to "be paid, and that is challenged by the contributory employee, "then the question arises between the administration authority "and the employee, and that question must be decided by the "Minister". I think that the Lord Chief Justice meant by that that the test to be applied was, whose act gives rise to the question which falls for decision under s. 35? In the present case, and indeed in any case where a pension is refused under s. 8, it arises because the administering authority refuse to pay; therefore, the administering authority are "the authority con-"cerned". As I read it, that is the effect of his judgment, and with this reasoning I respectfully agree.

Mr. Gardiner gave a number of illustrations which, he said, threw light in particular cases on who is the administering authority. Like my Lord, I do not derive very much assistance from those illustrations, because what we have to decide is who is "the "authority concerned" under s. 8. But let me take two sections on which I think Mr. Gardiner primarily relied. The first was s. 3; and on that, he said, it was plain that "the authority con-"cerned" would be the employing authority. That, of course, is clear from the regulations made under the section. Apart from the regulation and on the assumption that no regulations had been passed, let us see how the question would arise. The section concerns contributory employees, and if any person is a contributory employee he becomes subject to the contributions provided for in s. 6. If, therefore, an employing authority decide (whether they communicate their decision to the employee or not) that a person is a contributory employee, they will immediately deduct 5 per cent. of his remuneration from the employee's salary in accordance with s. 6. The question will then arise between the employee and the employing authority, because the employee will object to the deduction. So then it would clearly be a case where the employing authority are "the authority concerned" within s. 35.

But let me suppose (almost incredible that such a thing could arise) that the deductions are made, that no objection is taken by the employee, that deductions go on quite happily until he retires from the service of the employing authority, and that he then demands payment of the pension to which he claims to be entitled under s. 8 from the administering authority: it may well be (though it is not necessary for us to decide) that, if the administering authority were then to refuse payment, alleging that the employee had never become a contributory employee, that would be a question for the administering authority, and the contributor's only remedy for the refusal of his pension would be to appeal to the Minister.

As I have said, that does not arise for decision. I only mention it as I do not think that because Mr. Rowe admitted that, having regard to the regulations passed by the Minister pursuant to his powers under s. 36, it is clear that in questions arising under s. 3 the employing authority are " the authority concerned ", we must necessarily conclude that his attitude would have been the same if there had been no regulation.

The only other section to which I wish to refer is s. 10, sub-s. 4. Mr. Gardiner said that that sub-section made it quite plain that " the authority concerned " must be the employing authority in a case under s. 10, sub-s. 4. I am not sure that I should draw the same conclusion from that section as he would. No doubt the employing authority are given power in that case, and in that case only, to direct the return by the administering authority to an employee, who has been dismissed for an offence involving fraud, of a sum equal to the whole or a part of the aggregate amount of his contributions to the fund. But suppose that that direction is given, or that the employing authority think that they have given that direction, but that when the employee goes to the administering authority and demands payment, that authority refuse payment, saying that the document relied on is not a direction which complies with the section. That would, it seems to me, be a question between the administering authority and the employee, and the Minister would have to decide whether the document was or was not a direction which complied with the section. If, again, the dispute were whether the man had been dismissed for misconduct and he claimed payment under s. 8, then quite clearly, I think, for the reasons which my Lord has given, the position would be the same as in any other question whether the man had been discharged in circumstances entitling him to a pension under s. 8, the matter would be one for the decision of the administering authority, and they would be " the authority concerned ".

I would further refer only to the argument that " he who " pays the piper calls the tune ". It was said that in the present case the whole of the fund out of which the employees of the rural district council receive their pensions is provided by that council, and that therefore they must be the authority to decide whether or not the employee had fulfilled the conditions specified in s. 8, sub-s. 1. I agree with my Lord that one cannot properly regard any part of the moneys in the pooled fund under the control of Buckinghamshire County Council as the rural district council's own money. If during any quinquennial period any employee of the rural district council became entitled to a pension, he would be entitled to be paid out of the full fund, though the payment of that pension to him might involve drawing on moneys which had not been contributed by the rural district council. True it is that there are provisions in the Act which would enable the county council to put forward a scheme under which the rural district council would have to reimburse any excess drawings; but non constat that they are bound to do so or that necessarily that scheme would become law. In those circumstances, I do not think that the argument based on "He "who pays the piper calls the tune" justifies us in departing from what I think is the true interpretation of the sections which we have had to consider.

I agree that the appeal should be dismissed.

ASQUITH, L.J. I agree with the judgments given by my Lords.

Appeal dismissed.

Solicitors: *Timothy Hales; Pyke, Franklin & Gould.*

A. W. G.

HOTELS EXECUTIVE *v.* DERBY CORPORATION.

1950
July 19.

Lord Goddard C.J., Hilbery and Byrne JJ.

Rating—Derating—"Railway or canal hereditament"—Premises used as warehouse for railway hotels—Transport Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 49), *s.* 2, *sub-s.* 1 (*e*)—*Local Government Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *s.* 85, *sub-s.* 1, *s.* 86, *sub-ss.* 1 *and* 2.

A warehouse used for the storage of furniture and equipment for use in railway hotels and refreshment rooms is not a "railway or "canal hereditament" within the definition in s. 86 of the Local Government Act, 1948, and is therefore not exempted from liability for rating by s. 85, sub-s. 1, of the Local Government Act, 1948.

SPECIAL CASE.

The Hotels Executive, a public authority constituted under s. 5 of the Transport Act, 1947, to assist the British Transport Commission in the discharge of their functions, and to whom the commission, by a scheme made on July 1, 1948, delegated all their functions in relation to, amongst other things, the carrying on of hotels, restaurants and refreshment rooms, were the occupiers of a warehouse and cottages in Carrington Street, Derby. Those premises had been occupied until June 14, 1948, by the War Department, and no entry in relation to them therefore appeared in the valuation list for Derby county borough.

Derby County Borough Assessment Committee, having heard a proposal by Derby Corporation for the amendment of that list, determined to amend it by insertion of the premises at 450*l.* gross and 372*l.* rateable value in respect of the warehouse and 15*l.* gross and 9*l.* rateable value in respect of the cottages. Those values were agreed between the parties.

On March 2, 1949, the Hotels Executive gave notice of appeal against that determination to quarter sessions. By consent of the parties, and by order of Streatfeild J., a special case was stated for the opinion of the High Court, the parties agreeing that a judgment in conformity with that given should be entered on motion at quarter sessions.

It appeared from the special case that the premises were occupied by the executive in connexion with the carrying on of hotels, restaurants and refreshment rooms as a warehouse for furniture, carpets, bedding and other chattels awaiting repair or disposal to the various hotels, restaurants and refreshment rooms under their control.

The Hotels Executive contended that the premises in question were a "railway or canal hereditament" within the meaning of the Local Government Act, 1948, s. 85, sub-s. 1, and were not liable to be rated, on the ground that they were occupied for the purpose of the carrying on of hotels, restaurants and refreshment rooms, and that that was part of the commission's undertaking, subsidiary or incidental to the part of it concerned with the carriage of passengers by rail within s. 86, sub-s. 2 (*b*), of that Act (1).

---

(1) Local Government Act, 1948, s. 85, sub-s. 1, provides generally that premises which are or form part of a "railway or canal hereditament" shall not be liable to be rated or included in any valuation list.

Section 86, sub-s. 1: "In this Part "of this Act, except where the con-"trary is expressly provided, the "expression 'railway or canal heredit-"'ament' means a hereditament "occupied for any of the purposes "of the British Transport Commission "specified in subsection (2) of this "section: Provided that no premises "occupied as a dwelling-house, hotel "or place of public refreshment, or "so let out as to be capable of "separate assessment, shall be deemed "to be, or to form part of, a railway "or canal hereditament."

Sub-s. 2: "The purposes referred "to in subsection (1) of this section "(elsewhere in this Act referred to "as 'non-rateable purposes') are—"(*a*) all purposes of the parts of the "undertaking of the Commission "which are concerned with the car-"riage of goods or passengers by rail "or inland waterway or the provision "of facilities for traffic by inland "waterway; and (*b*) all purposes of "any parts of their undertaking "which are subsidiary or incidental "to any such part as aforesaid . . .".

The corporation contended that the premises were rateable as not being a "railway or canal hereditament" within the definition in s. 86.

The question for the court was whether or not the premises in question were a "railway or canal hereditament" within the definition in s. 86 of the Act of 1948.

Squibb for the Hotels Executive. The fact that the Parliamentary draftsmen have inserted the proviso to s. 86, sub-s. 1, shows that hotels would otherwise have fallen within s. 86, sub-s. 2 (*b*). If railway hotels are subsidiary or incidental to carriage of passengers by rail, so are railway-hotel warehouses, but the latter are not included in the proviso to s. 86, sub-s. 1.

Barclay Harris, for the corporation, was not called on to argue.

Lord Goddard, C.J. Section 2, sub-s. 1, of the Transport Act, 1947, an Act which in effect nationalized railways and vested them in the British Transport Commission, provides: "Subject "to the provisions of this Act, the commission shall have power— ". . . (*e*) in places within Great Britain where their passengers "may require them, to provide both for their passengers and for "other persons hotels, hostels, other living accommodation and "places for refreshment". The words "where their passengers "may require them" mean where a general demand by railway passengers arises. These words would not apply were one passenger to require the commission to provide a hotel, or simply because several passengers would like to have one. The words were, I think, inserted to show that the commission cannot necessarily open a hotel on the front at the seaside, or wherever they wish: they may open only railway hotels, which must primarily be used for railway passengers, but to which other people may go.

[His Lordship read ss. 85 and 86 of the Local Government Act, 1948, and continued:] The proviso to s. 86, sub-s. 1, took hotels and refreshment rooms entirely out of the derating provision of s. 85, sub-s. 1, and s. 86, sub-s. 2 (*b*), covers only purposes "subsidiary or incidental" to parts of the commission's undertaking which are concerned with the carriage of goods or passengers by rail. Hotels being taken out of the provision, it is impossible to hold that a store which is used for the purpose of hotels is a "railway or canal hereditament" within the meaning of s. 86. It may be that the question is one of fact; that being so, I would have no hesitation in finding that the hereditament was not a railway hereditament, because it was not concerned with the carriage of goods or passengers by rail. However, I think that it is more accurate to say that the question turns on the construction of s. 86. On the construction of that section I have no doubt but that the hereditament was not a "railway or canal hereditament" within the definition.

HILBERY, J. I agree.

BYRNE, J. I agree.

Judgment accordingly.

Solicitors: *M. H. B. Gilmour; Sharpe, Pritchard & Co.*

1950 *July* 25.

Lord Goddard, C.J., Byrne and Finnemore, JJ.

WILLEY *v.* PEACE.

Police (Metropolis)—Right of search—Person reasonably suspected of "having or conveying" stolen property—Search in police station—Whether transit broken—False imprisonment—Arrest—Necessity to inform person arrested of grounds—Circumstances such that he must know nature of alleged offence—Metropolitan Police Act, 1839 (2 *&* 3 *Vict. c.* 47), *s.* 66*—Prevention of Crimes Act,* 1871 (34 *&* 35 *Vict. c.* 112), *s.* 12.

Section 66 of the Metropolitan Police Act, 1839, provides that a constable may stop, search and detain "any person who may be "reasonably suspected of having or conveying in any manner any "thing stolen . . . ".

A police constable reasonably suspected a man of behaving suspiciously in the street and questioned him, but did not then suspect that he had on him stolen property. The man then voluntarily went with the constable to a police station. There a sergeant reasonably suspected that the man had stolen property in his pocket, although in fact he had only property of his own in it, and the sergeant and the constable detained and searched him.

Held, that the police officers were entitled to detain and search the man by s. 66 of the Act of 1839, notwithstanding that, at the time of the search, he was not in a street but in a police station, for the section applied where a person was carrying something suspected of being stolen in the course of a journey, and the call at the police station did not break the transit.

Hadley v. *Perks* (1866) L. R. 1 Q. B. 444, explained.

Reg. v. *Fisher* (1875) 39 J. P. 612, followed.

CASE STATED by Middlesex Quarter Sessions.

On January 18, 1950, at about 3.30 p.m., a police constable of the metropolitan police force on duty in plain clothes in Southgate, in the metropolitan police area, saw the defendant behaving suspiciously and reasonably suspected him of being a person loitering with intent to commit a felony. The constable told the defendant that he was a police officer and asked him what he was doing, and the defendant then abused him in an obscene way and said that he was going to the police station to complain. The constable accompanied him there, but did not arrest him. He had noticed that one of the defendant's pockets was bulging, but attached little or no importance to that. Nor was he aware that a house in the neighbourhood had recently been broken into.

At the police station the station sergeant, having heard the constable's story, and knowing that a house in the neighbourhood had recently been broken into, and noticing that the defendant's pocket was bulging, suspected that he had stolen property in it, and asked him what he had there. The defendant refused to say. The sergeant then said: " Very well, I shall search you ", and the sergeant and the constable then searched him. The defendant resisted forcibly and assaulted the constable. In fact he had only property of his own in his pocket, and no stolen property was found on him.

The defendant was charged with assaulting the constable when in the execution of his duty contrary to s. 12 of the Prevention of Crimes Act, 1871. He was convicted of that offence by Middlesex justices sitting at Enfield, and fined *5l.* His appeal to quarter sessions was dismissed, and he now appealed from that decision.

Sir John Cameron for the defendant. The constable was not, at the time of the assault, acting in the execution of his duty. He was acting unlawfully and in excess of his powers because (1.) the defendant was then wrongfully imprisoned, as he had not been informed of the grounds of his detention, or, alternatively (2.) the defendant was not then a prisoner under arrest and the constable therefore had no power to search him.

[LORD GODDARD, C.J. The defendant was obviously being detained at the time of the assault.]

The constable relied on s. 66 of the Metropolitan Police Act, 1839 (1). The word " having " in that section is synonymous with " conveying ": *Hadley* v. *Perks* (2). The latter part of that section applies only where a person is suspected of conveying goods in a street; it does not apply where, as in the present case, the defendant is only suspected of having stolen property on his person when he has voluntarily come into a police station. The section does not provide that a constable may arrest a person suspected "of having or conveying or of having "had or conveyed" stolen property. The constable in the present case never suspected that the defendant was carrying stolen property when he was in the street. *Reg.* v. *Fisher* (3) is therefore distinguishable.

---

(1) Metropolitan Police Act, 1839, s. 66: " . . . and every such constable may also stop, search, and detain any vessel, boat, cart, or carriage in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found, and also any person who may be reasonably suspected of having or conveying in any manner any thing stolen or unlawfully obtained ".

(2) (1866) L. R. 1 Q. B. 444.

A person is wrongfully imprisoned if he has not been informed of the grounds of his detention: *Christie* v. *Leachinsky* (4). The defendant in the present case was never informed of the grounds on which he was detained while he was being searched.

Gerald Thesiger, K.C., and *J. C. Phipps* for the prosecution were not called upon to address the court.

LORD GODDARD, C.J., stated the facts and continued:—The question is whether anything unlawful was done by the police. This seems to depend entirely on the construction of s. 66 of the Metropolitan Police Act, 1839. By that section a police officer who suspects on reasonable grounds that a person is carrying something stolen or unlawfully obtained may stop him, search him, and then, if necessary, detain him.

It is argued in this case that that can only apply when such person is "having or conveying"—which words are said to have the same meaning, and I think they have—something in the street. That is putting far too limited a construction on the section, as was shown in *Reg.* v. *Fisher* (5). That case was decided after *Hadley* v. *Perks* (6), in which Blackburn, J., in giving the judgment of the court, used language which might suggest that the person searched should be arrested in the street. What that judge was doing in that case, I think, was contrasting the power of search where a man was conveying something, and that where goods were not being conveyed at all but were in a house or warehouse, or something of that sort, in which case a search warrant must be obtained. A man having something in his possession as he walks along the street does not cease to be "having or conveying" it if he walks into a police station with it still on him, and is going to walk out of the police station if the police let him go.

In my opinion, as soon as the defendant went into the police station, and the sergeant had a reasonable suspicion, and there is no question but that he had a reasonable suspicion, that the appellant had stolen property on him, he was entitled to say: "I "am going to search you".

---

(3) (1875) 39 J. P. 612.
(4) [1947] A. C. 573.
(5) 39 J. P. 612.
(6) L. R. 1 Q. B. 444.

There was no necessity, in view of what took place, for the sergeant to say: "I reasonably suspect you of having stolen "goods". If it is necessary to decide the point, I think that the present case falls within the exception mentioned by Lord Simon in *Christie* v. *Leachinsky* (7), where he said: "The requirement "that the person arrested should be informed of the reason why "he is seized naturally does not exist if the circumstances are "such that he must know the general nature of the alleged "offence for which he is detained".

The power of search under s. 66 exists whether a crime has been committed or not, and whether or not the police are actually going to arrest a person in the sense of taking him before a magistrate: they may take him before a magistrate if they find property on him which has been stolen or unlawfully obtained. But the section gives them power to stop, search and, if necessary, detain. The person searched under s. 66 need not necessarily be in a street. The section also gives power to search any vessel or boat; and a vessel or boat is not usually in a street. The point is that the power is given where a person is carrying something, that is to say, in the course of a journey. In this case the defendant was in the course of a journey. He went into a police station to make a complaint about a police constable, but that did not break the transit. He still had property on him which was suspected of being stolen, although it was not; he had it both while he was in the street and in the police station. In my opinion, there was ample power given under this section to say: "We are stopping you "and we are going to search you". The defendant knew perfectly well why he was being searched—there can be no question about that—and I think that the police here acted strictly in accordance with s. 66.

Therefore quarter sessions and the justices came to a right decision, and the appeal fails.

BYRNE, J. I entirely agree.

FINNEMORE, J. I also agree.

Appeal dismissed.

Solicitors: *Hamilton-Hill and Evershed; Solicitor, Metropolitan Police.*

R. P. C.

---

(7) [1947] A. C. 573, 587.

1950
July 21.

Lord Goddard, C.J., Hilbery and Byrne, JJ.

MOORE *v.* RAY AND ANOTHER.

Food and drugs—Information—Alleged sale of milk "not of the nature, "substance and quality" demanded—Duplicity—Separate informations desirable—Defendant retailer's information against wholesaler—Proof of wholesaler's default necessary to defence—Summary Jurisdiction Act, 1848 (11 *&* 12 *Vict. c.* 43), *s.* 10—*Food and Drugs Act*, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *s.* 3, *sub-s.* 1, *s.* 83.

An information was preferred against a licensed retailer of milk, alleging that he sold through his agent to the prejudice of the purchaser "a certain article of food, namely, milk, which was not "of the nature, substance and quality" of the article demanded by the purchaser, contrary to s. 3 of the Food and Drugs Act, 1938. The retailer preferred an information under s. 83 of the Act against a company who had supplied the milk to him, alleging that the offence was due to their act or default. The justices dismissed both informations because, though they found that the milk was adulterated, they were, on the facts which they stated in the case, of opinion that there was a reasonable doubt who was responsible for the adulteration. On appeal by the prosecutor,

Held, that it was not sufficient to entitle the retailer to dismissal of the information against him that there was doubt whether he or his suppliers were responsible for the adulteration, for it was not necessary to conviction of the retailer that the justices should find that either he or the suppliers had committed the offence; that the retailer could not escape conviction unless he proved (a) that the suppliers had adulterated the milk, and (b) that he had himself acted with all due diligence; and that, as it was not clear whether the justices had realized that the retailer's acquittal depended on his proving those two things, the case must go back to them for reconsideration accordingly.

Per Curiam: Section 3 of the Act of 1938, in prohibiting the sale of food "which is not of the nature, or not of the substance, or "not of the quality of the food demanded" creates three separate offences: *Bastin* v. *Davies* [1950] 2 K. B. 579. Accordingly, an information alleging unlawful sale of food "not of the nature, sub-"stance and quality, etc." is bad as charging more than one offence. If a prosecutor is in doubt in which of the three respects the food should be alleged to be defective, he should prefer more than one information.

CASE STATED by Lancashire justices.

An information was preferred by a duly authorized officer of Lancashire County Council against the defendant Ray, a licensed retailer of milk, alleging that on January 23, 1950, at Penketh he sold through his agent to the prejudice of the purchaser "a

[Reported by Miss SHEILA COBON, Barrister-at-Law.]

"certain article of food, namely milk, which was not of the "nature, substance and quality" of the article demanded by the purchaser, contrary to s. 3 of the Food and Drugs Act, 1938 (1). That defendant preferred an information under s. 83 of the Act against the second defendants, Percy L. Rigby & Sons Ld., who had supplied the milk to him, alleging that the offence was due to their act or default (2).

On the hearing of the informations the following facts were found by the justices:—The first defendant was a licensed retailer of milk. On January 23, 1950, the prosecutor purchased a pint of milk from a servant of the retailer, and told her that it was intended to have the milk analysed. He divided it into three parts, one part being handed to the servant and one to the public analyst, and the third being produced in court. The public analyst's certificate showed that the sample was deficient to the extent of 26.7 per cent. of solids-not-fat.

On January 24, 1950, the prosecutor visited the retailer's farm and told him that he had come take a sample of milk. While he was at the farm, a lorry bearing the name of the suppliers and driven by their servant arrived and unloaded a ten-gallon can containing eight gallons of milk. The prosecutor took a sample of this milk, which was later shown to be genuine milk slightly low in its solids-not-fat content. The retailer had bought the milk which was sampled on January 23 from the suppliers, and the milk had been bottled by the retailer's servant. The bottles and measures were dry, and no water had entered the milk during bottling. The milk had not been interfered with while in the possession of the retailer. The suppliers had themselves delivered the milk to the retailer. Water could not have got into the milk while the churns were being filled at their factory. Their lorry driver had collected the milk on the night before at their dairy, taken it home with him, left the lorry and the milk standing outside his home all night, and delivered it to the retailer on the following morning. The cans of milk were not locked away, and were unattended during the night.

---

(1) Food and Drugs Act, 1938, s. 3: "If a person sells to the "prejudice of the purchaser any food "or drug which is not of the nature, "or not of the substance, or not of "the quality, of the food or drug "demanded by the purchaser, he "shall, . . . be guilty of an offence".

(2) By s. 83, sub-s. 1: "A per"son against whom proceedings are "brought under this Act shall, upon "information duly laid by him and "on giving to the prosecution not less "than three clear days' notice of his "intention, be entitled to have any per"son to whose act or default he alleges "that the contravention of the pro"visions in question was due brought "before the court in the proceedings, "and, if, after the contravention has "been proved, the original defendant "proves that the contravention was "due to the act or default of that "other person, that other person "may be convicted of the offence, "and, if the original defendant fur"ther proves that he has used all due "diligence to secure that the pro"visions in question were complied "with, he shall be acquitted of the "offence".

On the part of the prosecutor it was contended that the milk contained extraneous water, and that one of the defendants must be held responsible for the contravention of s. 3 of the Food and Drugs Act, 1938.

It was contended on behalf of the retailer that the whole of the period during which the milk was in his possession had been covered, and that the extraneous water could not have got into the milk while it was in his possession; that the whole period during which the milk was in the supplier's possession had not been covered, as the motor lorry in which the milk was being carried had been standing unattended in the open for several hours; that the contravention of s. 3 was due to the act or default of the second defendants; and that the retailer had used all due diligence to secure that the provisions in question were complied with.

It was contended for the suppliers that their factory was a modern one and that samples of milk were frequently taken by local authorities without complaint; that a bacteriologist was employed at the factory and made frequent tests; and that the milk delivered to the retailer on January 23 was part of several thousands of gallons of milk issued that day, this being the only complaint.

The justices, being of the opinion that there was a reasonable doubt who was responsible for the extraneous water in the milk, dismissed both informations.

Cantley for the prosecutor.

Stenham for the defendant retailer.

The defendant suppliers did not appear and were not represented.

LORD GODDARD, C.J. [after reading s. 83, sub-s. 1, of the Food and Drugs Act, 1938]:—So two people can be convicted—the original defendant, if he has not used all due diligence, and the person guilty of the actual contravention. The original defendant, if he has used all due diligence, can escape conviction, and the person who is responsible for the contravention alone can be convicted.

The justices in the present case found that the retailer did not add the water; but I do not know whether they appreciated that, unless he could prove that the suppliers were guilty of the contravention, he must be convicted; for he did, in fact, sell an article to the prejudice of the purchaser. It may be that the justices thought that they had to find either that the retailer or that the suppliers had added water by one of their servants.

That, however, is not what the Act provides: even if the justices did not think that the retailer added water, he had no defence under s. 83, sub-s. 1, to this prosecution unless he could also show, not only that he acted with all due diligence, but that the suppliers had committed the offence. I therefore think that this case must go back to the justices with the direction that, if they cannot find that the retailer has proved that the contravention was due to the act or default of the suppliers or their servant, they must convict the retailer. If they find that he has satisfied them that the contravention was due to the act or default of the suppliers or their servant and that the retailer used all due diligence to secure that the provisions of the Act were complied with, they should convict the suppliers and not the retailer. The costs of this special case should depend on the result. Whoever is ultimately convicted should pay them.

I wish to make a further observation about this case. It has for many years been common form to lay informations under the Food and Drugs Acts as they were laid in this case, that is, to charge " unlawfully selling to the prejudice of the purchaser a " certain article of food which was not of the nature, substance " and quality of the article demanded by the purchaser ". But a person may be guilty of an offence against s. 3, sub-s. 1, if he sells something which offends against the statute in any one of three different respects or in all of those respects; and, as we pointed out in *Bastin* v. *Davies* (3), there are three separate offences, and the defendant is entitled to know in which respect he is said to have offended against the section—whether the article sold is alleged to have been not of the nature, or not of the substance, or not of the quality demanded.

In *Bastin* v. *Davies* (3), an information was preferred against the defendant charging him with having sold " to the prejudice " of the purchaser . . . a certain article of food . . . which was " not of the nature or not of the substance or not of the quality " demanded . . .". We held that the information disclosed more than one offence and was therefore bad as being contrary to s. 10 of the Summary Jurisdiction Act, 1848. I think that the same objection applies if the word " and " is used instead of the word " or ", because the section does not say " which is not of " the nature, and not of the substance, and not of the quality ", but " not of the nature, or not of the substance, or not of the " quality ".

In future, clerks to magistrates, sampling officers and inspectors should know that they must state in which respect it is alleged that the offence has been committed. If they are in

(3) [1950] 2 K. B. 579.

1950

MOORE
v.
RAY.

Lord Goddard, C.J.

doubt, they can lay more than one information. As that point is not taken today, we do not give a formal ruling on it. I merely state that for the guidance and information of these inspectors and clerks to magistrates.

HILBERY, J. I agree.

BYRNE, J. I agree.

Appeal allowed.
Case remitted.

Solicitors: *Norton, Rose, Greenwell & Co. for Sir R. H. Adcock, Preston; Bentleys, Stokes & Lowless for Steels, Warrington.*

1950
July 21.

Lord Goddard C.J., Hilbery and Byrne JJ.

CORKERY *v.* CARPENTER.

Road Traffic—Drunk in charge of a bicycle—Whether bicycle a "carriage"—Licensing Act, 1872 (35 *&* 36 *Vict. c.* 94), *s.* 12.

The word "carriage" in s. 12 of the Licensing Act, 1872, by which "every person who . . . is drunk while in charge on any "highway . . . of any carriage, horse, cattle, or steam engine . . . may be apprehended, and shall be liable to a penalty . . . or . . . to imprisonment . . .", includes a bicycle, whether an ordinary passenger bicycle or, *semble*, a tradesman's bicycle or tricycle.

aylor v. *Goodwin* (1879) 4 Q. B. D. 228 applied.

Williams v. *Ellis* (1880) 5 Q. B. D. 175 and *Simpson* v. *Teignmouth and Shaldon Bridge Co.* [1903] 1 K. B. 405 distinguished.

CASE STATED by Devon Quarter Sessions.

The defendant, Shane John Corkery, was charged before justices with being drunk in charge of a bicycle on a highway at Ilfracombe on January 18, 1950, contrary to s. 12 of the Licensing Act, 1872; and with maliciously causing damage to a police cell, contrary to s. 14, sub-s. 1, of the Criminal Justice Administration Act, 1914. The justices found him guilty on both charges, sentencing him to one month's imprisonment on the first charge and three months' imprisonment on the second.

He appealed to quarter sessions, at the hearing before which the following facts were proved or admitted:—At about 2.45 p.m. on January 18, 1950, the defendant was pushing his pedal bicycle along Broad Street, Ilfracombe. He was drunk and creating

[Reported by Miss SHEILA COBON, Barrister-at-Law.]

a disturbance and incapable of having proper control over his bicycle. A police constable then arrested him without warrant for being drunk in charge of a bicycle on the highway. The defendant resisted arrest. Two police constables took him to the police station, where he was charged with being drunk in charge of a bicycle, forcibly searched, and lodged in a cell. He wrenched the lavatory seat there from its hinges and smashed nineteen panes of glass in the cell window, and did other damage in the cell, continuing to bang and shout most of the night. On the following morning he was charged also with maliciously causing damage, and the justices convicted him on both charges.

It was contended for the defendant on his appeal to quarter sessions that a bicycle was not a " carriage " within the meaning of s. 12 of the Licensing Act, 1872; that his arrest without warrant and his confinement in the cell were therefore unlawful; that he was entitled to break out of such unlawful confinement; and that, as he had been brought before the justices solely by virtue of the unlawful arrest, no information having been preferred against him, he was never properly before them at all and the proceedings were a nullity.

Quarter sessions were of the opinion that a bicycle was a " carriage " within the meaning of s. 12 of the Licensing Act, 1872; that the defendant was drunk in charge of a bicycle; that his arrest without warrant was therefore lawful; that he had maliciously caused damage amounting to 17*l*. 10*s*. 0*d*. to the cell; and that the proceedings against him on both charges were regular. They therefore confirmed the convictions and the sentences imposed on him by the justices.

D. M. Scott for the defendant. The word " bicycle " does not appear in s. 12 of the Licensing Act, 1872. The only word at all applicable is " carriage ", which does not include a bicycle. The point has never been decided by a court of record. The editors of Stone's Justices Manual express the opinion that a bicycle would be deemed a carriage within this section, but the cases referred to are all under other statutes and do not constitute authorities for the interpretation of the Licensing Act. A cardinal principle of interpretation is that in statutes concerning matters relating to the general public words are presumed to be used in their popular meaning. The popular meaning of " carriage " does not include a bicycle, as the words of the song " Daisy Bell ", show:—

It won't be a stylish marriage,
I can't afford a carriage,
But you'll look sweet upon the seat
Of a bicycle made for two.

Webster's Dictionary of 1920 states that "carriage" is obsolete or archaic except in the case of wheeled vehicles or railway carriages. The main "toll" cases are not really relevant, as the Acts with which they were concerned had different purposes from the Licensing Act, and in any case opinions differed on the question whether "carriage" included a bicycle: *Cannan* v. *Abingdon (Earl)* (1), *Williams* v. *Ellis* (2), *Simpson* v. *Teignmouth and Shaldon Bridge Co.* (3), *Smith* v. *Kynnersley* (4) and *Pollard* v. *Turner* (5).

Section 12 is a penal section providing for the arrest without warrant of an offender, and that is sufficient to require the court to put a narrow construction on it. The test is whether s. 12 conveys to the mind of the reader that it was Parliament's intention to include a bicycle. Violence must not be done to the language of the Act so as to bring within its terms articles which are not expressly included. In *Taylor* v. *Goodwin* (6), it was held that a person riding a bicycle on a highway at such a pace as to be dangerous to the passers by might be convicted of furiously driving a carriage under the Highway Act, 1835, s. 78; but as the Local Government Act of 1888 by s. 85 declared that bicycles were vehicles within the Highway Acts, it would appear that the legislature lacked confidence in the correctness of that decision. *Reg.* v. *Parker* (7) is not an authority on the point as there was no argument on whether a bicycle was a carriage within the meaning of s. 35 of the Offences Against the Person Act, 1861. The words of the enactments under review in these two decisions differ from those in s. 12 of the Licensing Act and are wider. Section 12 states: ". . . carriage, horse, cattle or "steam engine . . .", of which the common denominator is a force, something the motive power of which exists independently of muscular effort on the part of the person in charge. It is significant that the dominant words relating to "carriage" in s. 12 are "in charge", while, in the case of firearms, which are mentioned later in the section, the offence is committed by the person "in possession".

Wilmers, for the prosecutor, was not called upon to argue.

LORD GODDARD, C.J., stated the facts and continued:—The point, though it seems trivial, is of some importance because a doubt has been expressed by textbook writers whether a bicycle is a carriage within the meaning of that word used in s. 12, and

---

(1) [1900] 2 Q. B. 66.
(2) (1880) 5 Q. B. D. 175.
(3) [1903] 1 K. B. 405.
(4) [1903] 1 K. B. 788.
(5) [1912] 3 K. B. 625.
(6) (1879) 4 Q. B. D. 228.
(7) (1895) 59 J. P. 793.

Mr. Scott has called our attention to most of the cases decided on the word " carriage ".

The first thing to do in construing an Act of this sort is to see what was the purpose of the particular section. Obviously, it was passed for the protection of the public and the preservation of public order. Section 12 says: " Every person who in any " highway or other public place, whether a building or not, is " guilty while drunk of riotous or disorderly behaviour, or who is " drunk while in charge on any highway or other public place " of any carriage, horse, cattle, or steam engine, or who is drunk " when in possession of any loaded fire-arms, may be appre" hended, and shall be liable to a penalty not exceeding forty " shillings, or in the discretion of the court to imprisonment with " or without hard labour for any term not exceeding one month ".

In my opinion, and, I think, in the opinion of my brethren, it is clear that the word " carriage " is wide enough to include a bicycle for this purpose. It does not follow that in every Act of Parliament a bicycle is a carriage. That may depend on the particular words of the Act in question; and where the question has most commonly arisen is with regard to toll-bridges, because the proprietor of the toll-bridge has to show that the vehicle from which he seeks a toll is covered by the words of the Act of Parliament which allows him to impose a toll.

In this case the object of the Act is clear: it is the protection of the public and the preservation of public order; and for this purpose, I think, a carriage can include any sort of vehicle, certainly a vehicle which is capable of carrying a person; and, it may be, a vehicle capable of carrying goods. In my opinion, this case is decided, so far as this court is concerned, by *Taylor* v. *Goodwin* (8). That case, it is true, arose under the Highway Act, 1835, but for this purpose there cannot be any distinction between a section in a highway statute passed for the protection of the public and a section in a licensing statute passed for the same purpose, both of them concerning the conduct of a person on the highway and the preservation of public order.

The headnote to *Taylor* v. *Goodwin* (8), reads: " A person, " riding a bicycle on a highway at such a pace as to be dangerous " to the passers by, may be convicted of furiously driving a " carriage ". Section 78 of the Highway Act, 1835, provides that: " if any person riding any horse or beast, or driving any ' sort of carriage, shall ride or drive the same furiously so as to ' endanger the life or limb of any passenger ", he shall be guilty of an offence. It is true that the words there are " any sort of " carriage "; but that does not carry the matter any further, as a carriage is a carriage of some sort; a bicycle is a carriage, and therefore it comes within the word " carriage ". It is a carriage in my opinion because it carries. The court, in giving judgment in that case, said (9): " The expressions used are as wide " as possible. It may be that bicycles were unknown at the " time when the Act was passed, but the legislature clearly " desired to prohibit the use of any sort of carriage in a manner " dangerous to the life or limb of any passenger ". Applying that case, nothing can be more dangerous than a drunken man with a bicycle on a highway: he is dangerous whether he is riding the bicycle or pushing it, because even if he is pushing it he has not proper control over it, and can be a danger to others and himself.

---

(8) 4 Q. B. D. 228.

Is there anything in any of the other cases which obliges us to give a construction other than that given by the court in *Taylor* v. *Goodwin*? (10). A well-known case is *Cannan* v. *Abingdon (Earl)* (11), in which the question was whether or not a bicycle could be subjected to a toll in going over the bridge belonging to Lord Abingdon on the road between Oxford and Cheltenham. In that case the relevant Act allowed a toll to be imposed on carriages other than those which had been named in the section, the words of which were: " For every coach . . . or other carriage " whatsoever with four wheels the sum of fourpence, and with " less than four wheels the sum of twopence ". Bigham, J., said (11): " The bicycle or tricycle is a thing which carries. It " may carry a man, as a horse does, or a carriage does; it may " carry luggage or goods as we know that tradesmen's tricycles " do. It is, therefore, in my opinion, a carriage, and, being a " carriage, it is made by the terms of the Act of Parliament liable " to pay the toll ". It was held that a bicycle was a carriage.

There are other cases in which a distinction is drawn because of the actual words of the section. In *Williams* v. *Ellis* (12) the words of the Turnpike Act which imposed the tolls were, first, " for every horse, mule, or other beast drawing any coach, " sociable, chariot, berlin, landau, vis-à-vis, phaeton, curricle ", etc.; and then, " for every carriage of whatever description, and " for whatever purpose, which shall be drawn or impelled, or set " or kept in motion by steam or other power or agency ", and the court held that a bicycle was not caught by those particular words which had to be construed ejusdem generis with the carriages previously specified. To the same effect was *Simpson* v. *Teignmouth and Shaldon Bridge Co.* (13), where an enumeration of various coaches concluded: " for every other carriage hung on

---

(9) 4 Q. B. D. 229.
(10) 4 Q. B. D. 228.
(11) [1900] 2 Q. B. 66, 71.
(12) 5 Q. B. D. 175.
(13) [1903] 1 K. B. 405.

1950

CORKERY
v.
CARPENTER.

Lord Goddard C.J.

"springs". The court came to the conclusion that a bicycle did not come within any of the words in that section.

In spite of Mr. Scott's argument, I am clearly of opinion that the words of the Licensing Act are wide enough to embrace a bicycle under the expression "carriage". Therefore, the doubt which has been expressed by textbook writers on the subject need no longer exist, as this court has now construed the word "carriage" in the Licensing Act, 1872, as including a bicycle, whether it be a tradesman's bicycle or tricycle or the ordinary passenger bicycle—ordinarily called a push bicycle—as was the case here.

It follows that the defendant was lawfully arrested, and was accordingly in lawful custody at the police station. There was no excuse whatever for his breaking up the cell in the disgraceful manner in which he did, and he was properly sentenced to three months' imprisonment. The first point being decided as it is, the second falls to the ground. This appeal is dismissed.

HILBERY J. I agree.

BYRNE J. I agree.

Appeal dismissed.

Solicitors: *Arnold Carter & Co., for Crosse & Crosse, Exeter; Coode, Kingdon, Cotton & Ward, for Crosse, Wyatt & Co., South Molton.*

REX *v.* HARRIS.

C. C. A.
1950
Aug. 22.

Humphreys, Morris and Sellers, JJ.

Criminal law—Loitering with intent—Proof of intent—Known character of accused—Conditional discharge for previous offence—Not to be deemed a conviction—Inadmissibility of such conviction as proof of character—Admission in court of previous offence by accused—Evidence of person hearing admission receivable as evidence of character—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 4—*Prevention of Crimes Act,* 1871 (34 *&* 35 *Vict. c.* 112), *s.* 15—*Firearms Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 12), *s.* 23, *sub-s.* 2—*Criminal Justice Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 12.

Where an accused person has been conditionally discharged under s. 12 of the Criminal Justice Act, 1948, his conviction is not to be deemed a conviction for any purpose other than the purposes of the proceedings in which the order was made; and it therefore cannot be relied on as proof of his known character on a subsequent charge of being a suspected person loitering with intent to commit a felony. Evidence may, however, be given by a person who was present in court when the accused person was conditionally discharged that he heard him admit that he was guilty of the offence in question or had heard a jury find him guilty, and such evidence is properly admissible as proof of the known character of the person concerned.

APPEAL against conviction.

The appellant, Robert Victor Harris, was charged on an indictment at London Quarter Sessions with being in possession of an imitation firearm contrary to s. 23, sub-s. 2, of the Firearms Act, 1937. By that sub-section, "If any person at the "time of his committing, or at the time of his apprehension for, "any offence specified in the Third Schedule to this Act, has "in his possession any . . . imitation firearm, he shall, unless "he shows that he had it in his possession for a lawful object, "be guilty of an offence under this subsection. . . ." Among the offences specified in Sch. III are: "Offences under such of "the provisions of s. 4 of the Vagrancy Act, 1824, as are referred "to in, and amended by, s. 15 of the Prevention of Crimes Act, "1871, and s. 7 of the Penal Servitude Act, 1891".

Section 4 of the Vagrancy Act, 1824, as amended by s. 7 of the Penal Servitude Act, 1891, provides that "Every suspected "person or reputed thief frequenting or loitering in any . . . "street, highway or place . . . with intent to commit felony . . . "shall be deemed a rogue and vagabond". Section 15 of the Prevention of Crimes Act, 1871, provides that "in proving the "intent to commit a felony it shall not be necessary to show "that the person suspected was guilty of any particular act or "acts tending to show his purpose or intent, and he may be "convicted if from the circumstances of the case, and his known "character as proved . . . to the . . . court before . . . which "he is brought, it appears . . . that his intent was to commit "a felony".

At the trial of the appellant, evidence was given that on March 2, 1950, he was seen with two other men, who were charged with him, behaving in a suspicious manner. After being under observation for some time, one of the men was seen to take something from his pocket and hand it to the appellant who put it into the pocket of a raincoat which he was carrying over his arm. Eventually the men were arrested and an imitation firearm was found in the appellant's raincoat. Evidence was also given that each of the three men had been previously convicted. In the case of the appellant a deposition made in the police court by a witness, a detective constable, was read in which he said: "On December 21, 1949, I was present "at the County of London Sessions when Harris was conditionally discharged for twelve months. I produce the certificate "of conviction, exhibit 4. The defendant Harris in this case "is the man to whom the certificate relates".

The document was put in evidence and was subsequently read to the jury, or the effect of it was given to them by the chairman. It showed that on December 13, 1949, the appellant was convicted on his own confession on an indictment charging that on a date in the previous November he was found to have in his possession without lawful excuse certain implements of housebreaking.

The appellant had in fact also been bound over in 1945 on a charge of being a suspected person loitering with intent to commit a felony, but no evidence was given to the jury in relation to that charge.

The chairman, in summing up, told the jury that although, having regard to the provisions of s. 12 of the Criminal Justice Act, 1948 (1), the appellant's conviction in December, 1949, when he was conditionally discharged, was not to be deemed a conviction for the purposes of the case, in view of the provisions of s. 15 of the Prevention of Crimes Act, 1871, the jury were entitled to know the appellant's character, and he referred to both the previous charges against him.

The jury convicted the appellant, who appealed on the grounds that evidence of his previous conviction in 1949 had been improperly admitted and that the jury had been misdirected.

Craymer for the appellant. There are two grounds of appeal: (1.) that the evidence given of the appellant's previous conviction in December, 1949, when he was conditionally discharged under s. 12 of the Criminal Justice Act, 1948, was inadmissible; and (2.) that there had been misdirection by the chairman, who, in his summing up, inadvertently referred to another conviction of the appellant on a charge of being in possession of housebreaking implements in respect of which there was no evidence before the jury at all. The effect of the jury's being told that the appellant had had two previous convictions must have been to prejudice them in considering his known character.

---

(1) Criminal Justice Act, 1948, s. 12, sub-s. 1: "Subject as hereinafter provided, a conviction of an "offence for which any order is "made under this Part of this Act "placing the offender on probation "or discharging him absolutely or "conditionally shall be deemed not "to be a conviction for any purpose other than the purposes of the "proceedings in which the order is "made and of any subsequent proceedings which may be taken "against the offender under the "foregoing provisions of this Act".

[HUMPHREYS, J. How did that happen?]

The chairman probably learned of the fact of the second conviction in the course of some earlier proceedings which had taken place when the chairman discharged the jury on the ground that they had been informed of certain previous convictions against the appellant.

With regard to the admissibility of the detective constable's evidence, s. 12 of the Criminal Justice Act, 1948, clearly provides that, when an accused person has been conditionally discharged, that is not to be regarded as a conviction for any purpose other than the purposes of the proceedings in which the order is made. Normally, evidence of previous convictions is admissible to prove a person's "known character" within the meaning of s. 15 of the Prevention of Crimes Act, 1871: see *Rex* v. *Fairbairn* (2) and *Rex* v. *Clarke* (3); but in the case of a conditional discharge under s. 12 of the Act of 1948, there is an express statutory prohibition against the conviction being taken into account when considering the person's character in any later case, and he must be regarded as not having been convicted on a previous occasion. It is submitted that on either ground of appeal the appellant's conviction should be quashed.

Durand for the prosecution. The appellant was properly convicted. It is true that the chairman in his summing up inadvertently told the jury that the appellant had been before the courts on two previous occasions, when there was no evidence before them that such a thing had happened more than once; but, as the jury were entitled to be informed of the known character of the accused person, and there was other evidence before them in relation to it, it is unlikely that their view of his character would be affected by their being told that he had been twice in trouble instead of once.

With regard to the point that s. 12 of the Criminal Justice Act, 1948, should have prevented any reference from being made to the conviction of the appellant when he was conditionally discharged, there was no misdirection by the chairman, who pointed out to the jury that what happened on that occasion was not to be regarded as a conviction for the purpose of the case before them and added that they were entitled to be told what the known character of the appellant was. Section 12 of the Act of 1948 does not wipe out an offence to which it relates. The offence is still there, and the evidence in the present case clearly established that the appellant had been guilty of it since it was proved that he had admitted it, and evidence of that fact

(2) [1949] 2 K. B. 690.

(3) [1950] 1 K. B. 523.

was admissible under s. 15 of the Prevention of Crimes Act, 1871, in proof of his known character.

Humphreys, J. This is an appeal against conviction brought by leave of Parker, J., who, in granting the application for leave to appeal, said that, "having regard to s. 12 of the Criminal "Justice Act, 1948, the [detective constable's] evidence, and "the chairman's summing up, I think that this case should be "reviewed by the full court". It is right to say that Parker, J., expressed no opinion of his own on the matter, but thought that the case required consideration.

The question arises in this way:—The appellant, Robert Victor Harris, was charged on an indictment with a composite offence created by the Firearms Act, 1937, which, in effect, provides an additional penalty in the case of a person who has committed an offence under section 4 of the Vagrancy Act, 1824, if, on being arrested for that offence, he is found to be in possession of a firearm or imitation firearm. In this case there is no question but that the appellant was found to be in possession of a firearm at the time when he was arrested on a charge, under s. 4, of being a suspected person loitering with intent to commit a felony. Evidence was given to that effect before the chairman of London Quarter Sessions and a jury. We have been informed today by counsel, whose statement we, of course, accept, that some previous proceeding had taken place: a jury which had been sworn had been informed of certain previous convictions against the appellant. The chairman, who then came to the conclusion that it was doubtful whether the jury were entitled to know of those previous convictions, thought it right to discharge the jury—a course which is unquestionably open to a presiding judge in any case when he thinks that, the jury having heard some evidence which is, at least, of extremely doubtful validity, it would be safer to discharge them without giving a verdict at all, and have a fresh jury empanelled to hear the case. That was what was done in the present instance.

That circumstance accounts for something which gave members of this court some trouble when they were reading the papers, for it was noted that the chairman in his summing up referred to his ruling on the above question, though there is no evidence on the transcript of the shorthand note that he had given any ruling at all or that any objection had been made to the admission of any evidence. But the matter is now clear so far as the present trial is concerned. In addition to the evidence adduced for the purpose of showing that the appellant was in fact loitering with intent to commit a felony, further evidence was given. A witness named Hardy, who was a detective constable, had given evidence at the police court and had been provisionally bound over to appear at quarter sessions. His evidence was read to the jury, and it was as follows: "On "December 21, 1949, I was present at the County of London "Sessions when Harris was conditionally discharged for twelve "months. I produce the certificate of conviction, exhibit 4. "The defendant Harris in this case is the man to whom the "certificate relates", and the document was then put in. It was not read at that moment to the jury, but in our view there is nothing in that point because it was a document which was then in evidence; and it was subsequently read to the jury, or the effect of it was given to the jury, by the presiding judge. It appears to be a document showing that on December 13, 1949, the appellant was in due form of law convicted on his own confession on an indictment against him for that he at some date in the previous November was found to have in his possession, without lawful excuse, certain implements of housebreaking. In fact, that evidence was given without objection, but, as the transcript shows, I think that we must take it that objection had been made on some previous occasion, and that, apparently, the chairman had already heard the objection and overruled it.

The appellant was convicted by the jury and sentenced; and the first point taken on this appeal is that s. 12 of the Criminal Justice Act, 1948, prevents any reference being made to the previous conviction. That section provides: "Subject as herein-"after provided, a conviction of an offence for which an order "is made under this part of this Act placing the offender on "probation or discharging him absolutely or conditionally"— and this was a conditional discharge—"shall be deemed not to "be a conviction for any purpose other than the purposes of the "proceedings in which the order is made and of any subsequent "proceedings", which may be interpreted as meaning that if the person in question committed any other offence during the next twelve months he might be brought up and sent to prison or otherwise dealt with for the offence in respect of which he was conditionally discharged. In the opinion of the court, what the legislature was doing by the section was to provide that the method of dealing with persons who had been convicted, either by putting them on probation or discharging them straightaway or (the third possibility) ordering that they be conditionally discharged, should not have the effect of a previous conviction for the purposes of other Acts—and there are many—which in different ways and in different language provide that certain disabilities may and do follow from a person's being convicted who has already been convicted. It is clear, in our view, that that is the object of the section, and the matter is very well put, I think, in Morrison and Hughes on the Criminal Justice Act, 1948, where, in a note to s. 12, the authors state, at p. 35:

"The section absolves the offender from legal consequences "which otherwise would flow from a conviction". I think that that is exactly what it does.

In this case the offence was virtually one under the Vagrancy Act, 1824, which was amended by the Criminal Law Amendment Act, 1871. By s. 15 of that Act it is provided, with regard to s. 4 of the Act of 1824, that "in proving the intent to commit a "felony it shall not be necessary to show that the person sus"pected was guilty of any particular act or acts tending to show "his purpose or intent, and he may be convicted if from the "circumstances of the case, and from his known character as "proved to the justice of the peace or court before whom or "which he is brought, it appears to such justice or court that "his intent was to commit a felony". That obviously allows, in such a case, something to be given in evidence which would otherwise, according to the common law of England, not be admissible, that is, laying before the tribunal of fact evidence of the previous bad character of the accused person although he had not himself put his character in issue. In our view, no possible objection could have been taken in the present case if the detective constable, whose deposition I have read, had been present in court and had said: "I was in fact present at the court on the "day named when the accused was there, I heard him confess "to a charge of having been found in possession of certain "implements of housebreaking, and he was then dealt with in a "particular way, he being in fact discharged subject to the "condition that he commit no offence during the period of twelve "months thereafter". That would not strictly have been proving a previous conviction, but it would have been proof of the man's known character in that he was a person who had admitted in a court of justice that he had committed an offence.

In any future case arising under the Firearms Act which involves a trial on indictment before a jury the court should be careful to see that, in circumstances like the present, what the jury are told is not "This man has been previously convicted", because in a case to which s. 12 of the Criminal Justice Act, 1948, applies, the conviction itself is not to be regarded for the purpose of any other case as a conviction; but the jury should be told, and evidence should be given, that in fact the man was seen doing this, that or the other, which showed that he was a person of bad character; and included in the matters which may be proved would be that on a particular day he admitted that he was, or was found by a jury to be, a person who had committed a criminal offence. In the present case a good deal of difficulty has arisen because the detective constable was provisionally bound over and his evidence, of course, was taken quite shortly at the police court.

The chairman in his summing up said that the appellant, for the purpose of the case, had not been convicted; that is to say, he was directing the jury in the terms of s. 12 of the Criminal Justice Act, 1948, that they were not to take into account as a previous conviction the conviction which had been proved by the production of exhibit 4. He continued: "But I have ruled as a "matter of law that you are for this purpose just as much "entitled to know that Harris has been in trouble as you are in "the case of the other two, because you are entitled, as I under-"stand the law, for this purpose to know what the man's charac-"ter is". In our view, that direction is perfectly correct, and we are therefore of opinion that, so far as the first point on which the appellant relies is concerned, there was no misdirection by the chairman, and that point, therefore, fails. The chairman, in his summing up, went on to say: "In my opinion, it is quite "ludicrous to say that a person who has been found guilty, as "Harris was, of what in fact is a serious criminal offence, and "who has been treated by a merciful court by being discharged "conditionally to be of good behaviour, should be allowed to go "to a court with other persons whose previous convictions are "properly before the court, and who are having their characters "disclosed, and say to that court: 'I am a person of good "'character'". I think that there is much to be said for the view expressed by the chairman in that part of his summing up.

But another point was taken which, in our view, is a more difficult and serious one. It is said that the chairman in telling the jury, as he was entitled to, that they might, in accordance with the provisions of s. 15 of the Act of 1871, consider the appellant's known character as proved, added something which was not justified by any evidence which had been given before the jury at all. In his summing up he said: "Rightly or "wrongly, I have admitted the evidence of Harris's previous "record", and went on to say: "He has been bound over once "for being a suspected person loitering with intent to commit a "felony". There was no evidence whatever of that before the jury. There might have been, but there was not in fact. There was no question that it was perfectly accurate; no doubt the chairman had learned that fact from the proceedings which had been before him when he had discharged the first jury; but, so far as the jury who were trying the case were concerned, they had heard no evidence about it, and were informed of the fact for the first time by the chairman when he was purporting to sum up the evidence in the case. He told them that something very prejudicial to the appellant had been proved when in fact it had never been proved at all. In our opinion, that was such a serious matter that it becomes difficult to uphold this conviction. This court has always taken the view, and judges have always taken the view, that to tell a jury something to the detriment of a person on his trial, when in fact there was no evidence of it, is in itself a very serious matter; and in our view it is not cured by the argument, "anyhow the jury would probably come to that "conclusion because one case was properly before them in which "he had been convicted on his own confession and there would "have been no harm in saying that that had happened twice". That is an argument to which we cannot give effect.

On the whole, we think that in this case there was, quite unintentionally, so much possible prejudice which might have been instilled into the minds of the jury by their being told that the appellant was a person of such well-known character that he had been twice convicted, when in fact there was no evidence that any such thing had happened to him except on one single occasion, that the conviction ought not to be allowed to stand. It may well be that the jury would have come to exactly the same conclusion if that mistake had not been made, but this court cannot go into the question of how far the jury would regard two convictions as being worse than one conviction. For that reason our decision is that the conviction must be quashed.

Appeal allowed.

Solicitors: *The Registrar, Court of Criminal Appeal; The Solicitor, Metropolitan Police.*

P. B. D.

NEATH RURAL DISTRICT COUNCIL *v.* WILLIAMS AND ANOTHER.

1950
July 19, 20.

Lord Goddard, C.J., Hilbery and Byrne, JJ.

Nuisance—Obstruction of watercourse from natural causes—Obstruction not due to act or default of landowner—Notice from local authority to abate nuisance—Landowner's responsibility—Public Health Act, 1936 (26 *Geo.* 5 *& 1 Edw.* 8, *c.* 49), *ss.* 92, 93, 259.

Section 92 of the Public Health Act, 1936, creates certain statutory nuisances, and by s. 93 a local authority may serve an abatement notice on any person by whose "act, default or "sufferance" the nuisance arises or continues, requiring him to abate it. Section 259, sub-s. 1, provides that "(*b*) any part of a "watercourse . . . which is so choked or silted up as to obstruct "or impede the proper flow of water and thereby to cause a "nuisance" shall be a statutory nuisance to which s. 93 applies, "Provided that in the case of an alleged nuisance under para. (*b*) "nothing in this sub-section shall be deemed to impose any liability "on any person other than the person by whose act or default the "nuisance arises or continues".

A natural watercourse on the defendants' land became silted up owing to natural causes for which the landowners were not responsible, and caused a nuisance by flooding. The landowners did nothing to remove the obstruction, and an abatement notice was served on them, with which they failed to comply, with the result that a complaint was preferred against them under s. 93 of the Act.

Held, that the defendant landowners were not responsible for the nuisance by reason of the fact that they took no steps to abate it, for (1.) in the case of a natural stream a landowner had no duty at common law to keep the bed clear by removing obstructions which might arise from natural causes, and the proviso to s. 259, sub-s. 1, of the Public Health Act, 1936, was designed to prevent any additional duty from being cast on the landowner; and (2.) the fact that the landowners did nothing to remove the obstruction did not constitute a default by them, within the meaning of the proviso to s. 259, sub-s. 1, which caused the nuisance to arise or continue so as to except them from the immunity conferred by the proviso; and, moreover, as the word sufferance, which was present in s. 93, did not appear in that proviso, they did not lose that immunity by reason of their having suffered the nuisance to be on their land.

CASE STATED by Glamorgan justices.

A complaint was preferred on behalf of Neath Rural District Council that a certain nuisance arising in part of a watercourse situated in their rural district existed and that notices under ss. 93 and 259 of the Public Health Act, 1936, (1) to abate the nuisance had been served on the defendants, William David Williams and John Gwyn Llewelyn Williams, as being the persons by whose act or default the nuisance arose or continued, and that they had made default in complying with the terms of the notices.

At the hearing before the justices the following facts were proved or admitted:—Since November 23, 1943, the defendants

(1) Public Health Act, 1936, s. 92, sub-s. 1: "Without prejudice to the "exercise by a local authority of any "other powers vested in them by or "under this Act, the following "matters may, subject to the pro-"visions of this Part of this Act, "be dealt with summarily, and are "in this Part of this Act referred "to as 'Statutory nuisances'," that is to say: certain specified matters and "(*f*) any other matter declared "by any provision of this Act to be "a statutory nuisance".

Section 93: "Where a local "authority are satisfied of the "existence of a statutory nuisance, "they shall serve a notice (hereafter "in this Act referred to as 'an "'abatement notice') on the person "by whose act, default or sufferance "the nuisance arises or continues, or "if that person cannot be found, on "the owner or occupier of the pre-"mises on which the nuisance arises, "requiring him to abate the nuisance "and to execute such works and take "such steps as may be necessary for "that purpose . . .".

Section 259, sub-s. 1: "The fol-"lowing matters shall be statutory "nuisances for the purposes of Part had been the owners and occupiers of land on the right bank of a mountain stream or watercourse in which the nuisance was alleged to exist. The defendants' land had a frontage to, and adjoined, the watercourse from a point where it emerged from a culvert constructed by the Neath Coal Co. The culvert caused a diversion of the stream passing under the public highway and the Neath Canal to a point some seventy-three yards further downstream. The stream then flowed, first south and then east, past the defendants' land and continued in an easterly direction past other land, not belonging to the defendants, to join the River Neath. The channel of the watercourse from the point at which it emerged from the culvert and turned towards the south had become silted up for a distance of approximately sixty-three yards by a deposit of boulders, silt and other débris brought down by the stream. The deposit had accumulated gradually and slowly over a period of some twenty years and was due to natural causes.

As the result of the accumulation at and below the outfall of the culvert, the natural flow of the stream was impeded and, during and after heavy rain, when the stream was in flood, the water became penned back and from time to time overflowed its banks into an adjoining road, where it flooded the ground floors of certain houses, causing dampness in the lower rooms.

It was found by the justices that the stream was a watercourse within the meaning of s. 259, sub-s. 1 (*b*), of the Public Health Act, 1936, and that the flooding of the road and houses was a nuisance as creating conditions prejudicial to health. Except for the fact that the defendants did not comply with the notice served on them by removing the accumulation of débris, it was not proved or contended by the council that the defendants were responsible by any act or default of theirs for the accumulation of the débris.

It was contended for the council before the justices that although the defendant landowners had not been guilty of any breach of common-law duty, the terms of s. 259, sub-s. 1 (*b*), of the Public Health Act, 1936, created a statutory nuisance and that if a watercourse as there defined was so choked or silted up by natural causes as to obstruct or impede the proper flow of water and thereby to cause a nuisance, the section imposed a

"III of this Act, that is to say— " . . . (*b*) any part of a watercourse, " not being a part ordinarily nav- " igated by vessels employed in the " carriage of goods by water, which " is so choked or silted up as to " obstruct or impede the proper flow " of water and thereby to cause a " nuisance, or give rise to conditions " prejudicial to health: Provided that " in the case of an alleged nuisance " under paragraph (*b*) nothing in this " sub-section shall be deemed to " impose any liability on any person " other than the person by whose act " or default the nuisance arises or " continues ".

duty on the owner and occupier of the bed or channel of the watercourse to scour and cleanse it; and that, if he failed to do so, the nuisance continued by his default within the meaning of the sub-section.

It was further contended as follows:—It was provided by s. 57, sub-s. 1, of the Land Drainage Act, 1930, that, where by reason of the neglect of the occupier of land to scour the channel of a watercourse passing through or over his land injury was caused to other land, the owner of that land might serve a notice on the owner of the first-mentioned land requiring him to cleanse and scour the channel of the watercourse. Section 57, sub-s. 2, of the Act provided that, on failure to comply with such a notice within two months, the person by whom the notice was served might execute the necessary work and recover the cost. The failure of the defendant landowners to scour the channel in the present instance was a breach of the statutory duty imposed on them by the Land Drainage Act, 1930, and a breach of an obligation which they were legally compellable to perform apart from the Public Health Act, 1936. The latter Act was intended to provide a summary remedy to a local authority by enacting that the breach of an obligation which the defendants, as landowners, were legally compellable to perform should be a statutory nuisance as defined in s. 259 of the Act.

It was contended for the defendants: (1.) that s. 259, sub-s. 1 (*b*), of the Public Health Act, 1936, merely provided a summary remedy for what was, in law, a nuisance; (2.) that at common law no damage caused by the natural use of land was actionable, and that that natural use of land would not be a nuisance and could not be the subject of summary proceedings based on a statutory nuisance as defined in the Public Health Act, 1936; (3.) that the silting up of the watercourse was an act of Providence arising independently of the defendants' use of the land; (4.) that so long as they did not interfere with the natural acts of Providence arising as the result of the super-imposing of the culvert and the diversion of the watercourse, they were not guilty of any actionable wrong, and that, unless they were guilty by act or omission of some actionable wrong, they could not be guilty of the alleged statutory nuisance; and (5.) that the nuisance caused by the flooding did not arise or continue by any act or default of the defendants.

The justices were not satisfied on the evidence that the defendants or either of them had done or had neglected to do anything to cause the flooding, and they dismissed the complaint. The rural district council appealed.

Rowe Harding for the rural district council.
H. V. Brandon for the defendants.

The arguments appear from the contentions set out above and from the judgment of Lord Goddard, C.J.

LORD GODDARD, C.J. The case in some respects raises questions of difficulty owing to the large number of authorities to which our attention has been called. Unfortunately, it appears to me to fall just within the definition of a criminal cause or matter, because, under the fasciculus of sections with which we are concerned, justices are empowered, if they think fit, to impose a penalty. I desire to express no definite opinion whether the matter is or is not appealable. If it is, it is eminently a case which should go to the Court of Appeal in view of the different authorities on the subject. It may, however, be that our judgment is final, and having had the advantage of a very full argument on both sides, and having considered the authorities to which our attention has been drawn, I have come to the conclusion that the justices were right in dismissing these complaints.

[His Lordship referred to the facts and continued:] The sections which we have to consider in the first place are sections of the Public Health Act, 1936, which replace sections of the Public Health Act, 1875, and earlier Acts; and the considerations which apply to the earlier cases apply, no doubt, at the present day to the sections which we have to consider. Part III of the Act of 1936 concerns nuisances and offensive trades, and s. 92 creates what are called in the Act, statutory nuisances, that is to say, " (*a*) any premises in such a state as to be prejudicial " to health or a nuisance; (*b*) any animal kept in such a place " or manner as to be prejudicial to health or a nuisance; (*c*) any " accumulation or deposit which is prejudicial to health or a " nuisance ". I need not read them all, but they are all matters which may be, and which are in fact, capable of being ordinary common-law nuisances; and the object of this Part of the Act is to give a quick and summary remedy for the stopping and discontinuance of these nuisances.

The scheme of the Act is that the local authority should serve notices requiring the abatement of the nuisances, their discontinuance and the prevention of their recurrence; and, if the notices are disobeyed, the justices can make an order requiring the person to abate the nuisance and to take steps against its recurrence. They may, not must, in a proper case, impose a fine of 5*l*, and there is also a provision that not only may they impose a fine of 5*l*., but also a daily fine, if their order is not obeyed.

Next comes s. 259 in Part XI, the miscellaneous part of the Act, which provides: " The following matters shall be statutory " nuisances for the purposes of Part III of this Act, that is to "say—(a) any pond, pool, ditch, gutter or watercourse which "is so foul or in such a state as to be prejudicial to health or "a nuisance; (b) any part of a watercourse, not being a part "ordinarily navigated by vessels employed in the carriage of "goods by water, which is so choked or silted up as to obstruct "or impede the proper flow of water and thereby to cause a "nuisance, or give rise to conditions prejudicial to health". Pausing there for a moment, the effect of that provision is that if it is found that a watercourse is in that state—and, be it observed that in my opinion it applies to a natural as well as to an artificial watercourse—it becomes a statutory nuisance, and the provisions of Part III of the Act with regard to its abatement, the notice that can be given, and the proceedings taken, and so forth, apply.

It is important to observe that, whereas s. 93 in Part III provides: "Where a local authority are satisfied of the existence "of a statutory nuisance, they shall serve a notice (hereafter "in this Act referred to as 'an abatement notice') on the person "by whose act, default or sufferance the nuisance arises or "continues, or, if that person cannot be found, on the owner or "occupier of the premises on which the nuisance arises, requiring him to abate the nuisance . . .", s. 259, which brings the watercourse within Part III, contains this proviso: "Provided "that in the case of an alleged nuisance under paragraph (b) "nothing in this sub-section shall be deemed to impose any "liability on any person other than the person by whose act "or default the nuisance arises or continues". The absence of the word "sufferance" in s. 259 may be very important in this case, because it is quite clear, taking ss. 93 and 259 together, that, whereas in the case of the statutory nuisances referred to in s. 92, the local authority can proceed against a person who has suffered a nuisance to continue, in the case of a nuisance due to a choked watercourse, under s. 259 there is no liability on any person unless the nuisance arises or continues from his act or default. The answer to the present case depends entirely upon whether it can be said that a landowner on whose land there is a watercourse which becomes choked by natural causes, such as the action of the water on land or on rocks, or by weeds or by any other natural cause, can be said to be a person by whose act or default the nuisance "arises or continues". Does the fact of the choking of itself impose a liability on the landowner to clear the watercourse?

Apart from authority, I think that the position is as follows: a landowner is not at common law under any liability to do anything with regard to a watercourse if it is a natural watercourse which flows through his land. If he creates a watercourse, or does anything to make artificial that which was previously natural, very different considerations arise, and that is why I thought at first that the recent decision in the House of Lords in *Sedleigh-Denfield* v. *O'Callaghan* (2) might have a bearing on our decision here. In my opinion, however, that case does not apply because, if one reads the speech of Viscount Maugham, L.C., with care, it seems to me implicit that he is considering a case where there was a ditch into which had been inserted a pipe for the purpose of carrying off water, which pipe those on whose land it was, had allowed to get choked. I think it quite clear that he was referring throughout, and intended to refer throughout, to an artificial watercourse or to a case where works had been done to the watercourse, and not to the ordinary bed of a natural stream. I therefore do not think it necessary to discuss the principles laid down in that case, the decision in which was that if a person allows a nuisance to continue on his land, even though it had been originated by a trespasser, he nevertheless becomes liable.

I think that the proviso to s. 259 is designed to prevent an additional duty from being cast upon a landowner, since, as I have already said, at common law a landowner is under no duty, so far as a natural stream is concerned, to do works for keeping the bed clear or for removing obstructions which may arise in the natural course of events.

Authority on the point is to be found first, and I think, quite clearly, in *Hodgson* v. *York Corporation* (3). It is unnecessary to go through the somewhat complicated facts of the case, but it was alleged there that flooding had been caused through allowing a stream to get choked by weeds. Blackburn, J., who delivered the leading judgment, said, referring to the judgment of the county court judge (4): "But he goes on to say that the "liabilities of the corporation, after due provision for the escape "of the water, were such only as attach at common law to the "owners of the natural bed of a river; and that the respondents "were not, under the said Act or at common law, under any "obligation to remedy any natural and gradual silting up and "growing up of weeds in the said bed for the benefit of adjacent "landowners. In this I am of opinion he was right". There is a clear expression of opinion by a judge of the highest eminence that the owner of the bed of a stream is not under any obligation at common law to remedy the natural and gradual silting up of the stream; and it makes no difference, in my opinion, whether the silting up is caused in one way or in another. As everybody knows, an obstruction may be caused by a heavy growth of weeds in the bed of the stream; or by sand and earth being washed down. It may also be caused by boulders or rocks being washed down a mountain stream; and I think that the common law of England has never imposed liabilities upon landowners for anything which happens to their land in the natural course of affairs if the land is used naturally.

---

(2) [1940] A. C. 880.
(3) (1873) 28 L. T. 836.
(4) Ibid. 839.

I would quote this passage in the speech of Lord Cairns, L.C., in *Rylands* v. *Fletcher* (5): "And if, in what I may term the "natural user of that land, there had been any accumulation of "water, either on the surface or underground, and if, by the "operation of the laws of nature, that accumulation of water "had passed off into the close occupied by the plaintiff, the "plaintiff could not have complained that that result had taken "place". That quite clearly shows that if, for instance, the course of a stream has been diverted by a storm—and there are many instances to be found in this country where such a thing has happened—no one is liable, for what happened was in the course of nature. There is a very striking instance of such a diversion in the case of the River Ouse which now flows out to sea at Newhaven and used to flow out at Seaford Head, at which place the old bed of the river can be seen. History relates that the course of the river was diverted somewhere in the sixteenth century as the result of a severe storm.

In this connexion it is by no means foreign to this case to refer to the judgment of Eve, J., in *Pontardawe Rural District Council* v. *Moore-Gwyn* (6), because in my view the principle which applied in that case applies in the present instance. The headnote states: "The owner of land on which there is an out-"crop of rock overhanging a steep slope is not liable for damage "caused by reason of portions of that rock breaking away and "falling down the slope if the break is due to natural causes, such "as weathering, and the owner has used his land in an ordinary "way, without any mining or quarrying operations". In that case there were rocks on a man's land which broke off and rolled down on to other people's land and did damage. If that happens in the ordinary course of events the owner of the land is under no liability. The position was the same in *Giles* v. *Walker* (7), where the plaintiff sought to recover damages by reason of his neighbour's allowing thistledown to blow from his field on to the plaintiff's land and damage it. This court very summarily dismissed that contention as unheard of, saying that a man could not be liable for what happened in the ordinary course of nature. It is because of that class of case that various regulations have been made by the Ministry of Agriculture for compelling people to clean their land of weeds, for there is no remedy at common law and it is not desirable that agricultural land should become choked by weeds.

---

(5) (1868) L. R. 3 H. L. 330.

(6) [1929] 1 Ch. 656.

(7) (1890) 24 Q. B. D. 656.

Enough, I think, has been said to show that it is well established that there is no common-law duty on the owners or occupiers of the land in the present case to do anything to the stream or to the bed of the stream provided that the existing obstruction was caused by natural and not artificial causes and that the stream is a natural and not an artificial one.

Before I pass to the authorities under the section with which we are concerned, I must consider an argument which has been advanced by Mr. Rowe Harding, although this is apparently the first case in which the point has ever been raised in connexion with statutory nuisances due to watercourses: he submits that a duty has now been put upon landowners, upon whose property watercourses exist, by reason of the Land Drainage Acts. The Act which is now in operation, and which we must consider because it was in operation at the time of the Public Health Act, 1936, is the Land Drainage Act, 1930, which, no doubt, consolidated, re-enacted, and to some extent amended the previous Acts, including an Act of 1847.

Two sections are material. The first is s. 35 in Part V of the Act, headed " Members and Proceedings and Powers of Drainage " Boards ". Without giving a concluded opinion on the matter, it seems to me that it is probably only applicable if the watercourse in question is within the district of a drainage board because of the fasciculus of sections which constitute Part V. The section provides: " Where any watercourse is in such a " condition that the proper flow of water is impeded, it shall, " except where the condition of the watercourse is attributable " to subsidence of surface due to mining operations (including " brine pumping), be the duty of the person having control of the " watercourse or of the part thereof where the impediment occurs, " or, if that person is not known, the person occupying the land " through which the watercourse or that part of the watercourse " passes, to put the watercourse or that part of the watercourse " in proper order if by reason of such impediment agricultural " land belonging to or in the occupation of some other person is " injured by water or in danger of being so injured ".

That section obviously imposes a statutory duty on a person on whose land the watercourse is situate, and, that being so, it imposes a duty other than the common-law duty on the landowner; but we are not here in any way concerned with agricultural land or with any proceedings taken in respect of any default under the Act of 1930. Further, as I have said, in my opinion it probably only applies to a watercourse which is within the area of a drainage board, and there is no evidence or suggestion that the present was such a one.

In addition, reliance was placed upon s. 57 of the Act which provides: "Where by reason of the neglect of the occupier of "any land to maintain or join in maintaining the banks, or to "cleanse and scour or join in cleansing and scouring the "channels, of watercourses passing through, over or adjoining "his lands, injury is caused to any other land, the owner or "occupier of that land may serve notice on the said occupier "requiring him, as the case may be, to maintain the banks or "cleanse or scour the channels, or to join in maintaining the "banks or in cleansing or scouring the channels of the water-"courses". By sub-s. 2, if any person is in default after notice has been duly served upon him and fails within two months from the date of the service to comply with the requirements, "the "person by whom the notice is served may, if he thinks fit, "execute all such works as are reasonably necessary", and recover the expense of so doing.

Again, I do not think we are concerned with that in the present case because it seems to me only to impose a duty upon the owner or occupier of the land if he has been served with a notice. It is, in effect, giving a new remedy, a statutory remedy, and a statutory cause of action, to an adjoining landowner, first enabling him to serve a notice calling upon a person to do something which he was otherwise not under a liability at common law to do, and then providing that, if he neglects to do it, the person serving the notice may do it himself and recover the cost. I cannot read that section as imposing a duty at large. The obligation seems to me to arise only where the notice has been served, and there has been a failure to comply with it; so I do not further consider the land drainage cases, and I do not think that the decision in *Finch* v. *Bannister* (8), to which we have been referred, gives any real help upon this matter, because the ratio decidendi of that case, both in the Divisional Court and the Court of Appeal, was that a mill was not land within a particular section.

I turn to certain authorities on the question of nuisance to which our attention has been directed. The first is *Margate Pier Proprietors* v. *Margate Corporation* (9) on which Mr. Rowe Harding strongly relied. The headnote states: "The harbour "of Margate was vested in the Margate Pier and Harbour "Company, and by the action of the sea a quantity of "seaweed was drifted into the harbour, and, being left there, "became a nuisance. *Held*, that the company were bound to "remove it, and that not having effectually done so, an order

---

(8) [1908] 1 K. B. 485, C. A. [1908] 2 K. B. 441.

(9) (1869) 20 L. T. 564.

"was rightly made upon them" under a section of the Nuisances Removal Act, 1855.

In the course of the argument Lush, J., said: "It is not so "stated in the case, and I cannot assume that there would not "be the same accumulation if the piers were not there". The piers in question, which were erected by the company, had apparently caused the accumulation of the seaweed. In giving judgment, Lush, J., said: "I have no doubt what-"ever that it is the duty of the appellants to prevent the "accumulation of seaweed, so that it shall not become a "nuisance, and that, whether produced by natural or artificial "causes, they are bound to remove all matter in the harbour "which is a nuisance, or injurious to health". We need not consider that case at great length, because one thing shown to have happened there was that the accumulation had occurred owing to the building of the piers, and therefore there had been something done which caused an accumulation to take place. I think that there is an obvious difference between a person's allowing seaweed or any other form of what may become filth to accumulate on his land and failing to remove it when it becomes a nuisance, and something which is alleged to be a nuisance merely as the result of the ordinary natural happenings which occur in the bed of a stream. I do not think that that case is really helpful in considering the present one.

Attorney-General v. *Tod Heatley* (10) was again a very different case. There, a landowner in London allowed a piece of his land to get into a filthy condition. The court approved the *Margate Pier* decision (11). The headnote reads: "The defen-"dant was the owner and occupier of a vacant piece of land "in the metropolis. He had surrounded it by a hoarding, but "people threw filth and refuse over, and broke up the hoarding, "so that the condition of the land and the use to which it was "put constituted a continuing public nuisance. In an action "by the Attorney-General at the relation of the vestry of the "parish: *Held*, that it was a common law duty of the owner "of the piece of land to prevent it from being so used as to be "a public nuisance; and that the Attorney-General was entitled "to an injunction to enforce the performance of that duty". There the nuisance arose, not from natural causes, but because the owner of the land did not prevent people from throwing filth on to it, and therefore permitted the accumulation of filth on the land. That, again, I do not think helps us here.

A case which, perhaps, needs more careful consideration is *Clayton* v. *Sale Urban District Council* (12), to which the

(10) [1897] 1 Ch. 560.
(11) 20 L. T. 564.
(12) [1926] 1 K. B. 415.

headnote is as follows: " Where a nuisance has arisen on land " adjoining a river by flooding through a breach in the flood bank " thereon, the owner of the land may, under the Public Health " Act, 1875, s. 94, be required to abate the nuisance, if it be " found that the nuisance arose or continues by his ' act, default, " ' or sufferance ', notwithstanding that, apart from that section, " he is under no obligation by contract or otherwise to maintain " or repair the flood bank ". The court there distinguished *River Thames Conservators* v. *Port of London Sanitary Authority* (13). Mr. Brandon contended that in *Clayton's* case (14) the court had misunderstood or had taken a wrong view of what was held in the *Thames Conservators* case (15), and that he derived assistance from the latter when it was properly understood.

Whether it would be open to this court to say that the court in *Clayton's* case (14) was wrong in its view of the *Thames Conservator's* case (15), would perhaps raise a very nice question. Of course, if there are two conflicting authorities, it is always open to the court to follow that which it prefers; but in *Clayton's* case (14) the court did, rightly or wrongly—and we must assume rightly—distinguish the *Thames Conservators* case (15), saying that the part of Lord Coleridge's judgment in that case, on which, I think, Mr. Brandon wished to rely, was obiter. I do not find it necessary to decide that interesting question, or to say whether I prefer *Clayton's* case (14) to the *Thames Conservators* case (15), because in my opinion the former decision does not affect the present case. If, under s. 259 of the Public Health Act, 1936, an obligation were imposed upon a landowner who, by his act, default, or " sufferance ", allowed this state of affairs, of which complaint was made, to continue, it might be that we should have to come to a different decision from that which we are giving today. It is observable that there is a great distinction between s. 94 of the Public Health Act, 1875, the only section with which the court was concerned in *Clayton's* case (14), and s. 259 of the Act of 1936, with which we are concerned, because in the latter the word " sufferance " does not occur. In my opinion what we have to consider is whether the obstruction in the present case was caused and was continued by the act or default of the defendants, and not whether it was caused and continued through their act, default, or sufferance. I cannot construe the word " default " here in the way in which we have been asked to construe it by the rural district council. I do not think that in this case "default " could mean merely doing nothing, unless an obligation to do something were imposed by the Act. There was no act of the defendants which caused the obstruction either

(13) [1894] 1 Q. B. 647.
(14) [1926] 1 K. B. 415.
(15) [1894] 1 Q. B. 647.

to arise or to continue. I can well understand that there might be a case where it might be said that a person who failed to do something which he ought to have done, such for instance, as failing to prevent obstructive matter from going into a river from his own premises, had caused an obstruction by his default. In the present case, on the facts found by the justices, there is nothing to show that the defendants did anything which caused this obstruction to arise or to continue; nor do I think that there is anything which can properly be called a default on their part, although there might have been facts which amounted to a sufferance; but that word, I repeat, does not occur in the particular proviso with which we are concerned. In my opinion the justices were fully justified in coming to the conclusion at which they arrived, and this appeal fails.

HILBERY, J. I agree.

BYRNE, J. I agree.

Appeal dismissed.

P. B. D.

Solicitors: *Sharpe, Pritchard & Co., for T. D. Windsor Williams, Neath; Seeley and Son for Lewis C. Thomas, Son, and Blazey, Neath.*

REX *v.* DUNSHEATH. *Ex parte* MEREDITH.

1950
July 27, 28.

Lord Goddard, C.J., Byrne and Finnemore, JJ.

Mandamus—Alternative remedy—University—Domestic dispute—Question for Visitor—University of London Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 46), *ss.* 4, 5.

The court will not issue an order of mandamus if there is an alternative remedy open to the applicant. Where there is a Visitor of a corporate body, the court will not interfere in any matter within the Visitor's jurisdiction, and any question of a domestic nature is essentially one for the Visitor, whose decision upon it is final. These principles apply equally to a corporation set up by Act of Parliament as to a corporation established by charter, and equally to a college as to a university.

A dispute concerning the refusal of an officer of a university established by Act of Parliament to perform a duty alleged to be placed upon him by statute is a domestic matter within the jurisdiction of the university Visitor, and accordingly mandamus will not lie to compel him to perform that duty.

[Reported by Mrs. L. J. A. BUCHER, Barrister-at-Law.]

1950

Rex
v.
Dunsheath.
Ex parte
Meredith.

St. John's College, Cambridge v. *Todington* (1), *Philips* v. *Bury* (2), *Attorney-General* v. *Talbot* (3), *Attorney-General* v. *Smithies* (4), *Thomson* v. *The University of London* (5), considered. *Reg.* v. *Hertford College, Oxford* (6), applied.

Application for an order of mandamus.

On June 14, 1950, the applicant Meredith, a graduate and member of Convocation of London University forwarded to the clerk of Convocation requisitions signed by seventy-nine fellow-members asking for an extraordinary meeting of Convocation to be summoned, in accordance with statutes 61 and 62 (7), of the University of London Statutes, to consider the following motion:—

" Motion on Political Discrimination in the University. That " this House, having considered the following points relating to " Mr. Rothstein, a lecturer at the School of Slavonic and East " European Studies (8):—

> " (*a*) that Mr. Rothstein has taught successfully in the " University for nearly four years, without as far as he is " aware the methods or content of his work having been " criticized or called into question, and that on the contrary " he has received the warmest expressions of confidence from " his staff colleagues and students;
>
> " (*b*) that Mr. Rothstein has been and still is an examiner " in the University and has prepared at the request of the " Senate, the syllabus on which external students will be " examined in his subjects in the year 1951;
>
> " (*c*) that during a study, extending over thirty years, of " Russian history and Soviet institutions, including much " first-hand experience, Mr. Rothstein has published a " number of works which have been widely recognized as " serious contributions to knowledge, although in view of

---

(1) (1757) 1 Burr. 158.

(2) (1692) 4 Mod. 106.

(3) (1747) 3 Atk. 662.

(4) (1836) 1 Keen 289.

(5) (1864) 10 Jur. (n.s.) 669; 33 L. J. (Ch.) 625.

(6) (1878) 3 Q. B. D. 693.

(7) The University of London Statutes are made by virtue of s. 4, University of London Act, 1926, and are approved by His Majesty in Council as required by s. 5. Statute 61 provides: " The ordinary meet- " ings of Convocation shall take " place on such days as Convoca- " tion shall determine, provided that " at least one ordinary meeting shall " be held in each year. Convocation " may discuss any matter relating to " the University and declare its " opinion thereon to the Court or to " the Senate " (of the University).

Statute 62 provides: " The Chair- " man of Convocation may at any " time at his discretion, and shall " upon the requisition in writing of " not less than fifty members of " Convocation stating the purpose for " which the meeting is to be called, " summon an extraordinary meeting " of Convocation . . .".

(8) A school connected with London University.

"their subject-matter they have necessarily been contro-"versial;

"(*d*) that many comments have been made in University "circles and in the public press expressing doubts as to "whether the decision by the School Council not to renew "after September, 1950, Mr. Rothstein's appointment as "lecturer on Soviet Institutions could reasonably have been "arrived at on grounds of scholarship and academic status;

"(*e*) that widespread suspicion has been unfortunately "aroused that it is Mr. Rothstein's political opinions as a "member of the Communist Party that have led to the "non-renewal of his employment;

"And recognizing that any introduction of political tests or other "interference with academic freedom cannot but result in the "deterioration of standards of teaching and scholarship and "gravely injure the reputation of the University;

"Therefore declares that victimization or discrimination on "political grounds and similar inroads on the academic or "personal freedom of members or employees of the University "are completely foreign to its traditions and should be vigorously "resisted;

"Further believes that a full and independent inquiry into the "case of Mr. Rothstein would serve to defend the interests and "good name of the University;

"And requests the Chairman to make these opinions known to "the Senate."

The Chairman of Convocation, the respondent, Dr. Dunsheath, refused to call the extraordinary meeting on the ground that "the motion as drafted was out of order". His reasons for that decision were that the motion was "not one which 'related to "'the University'", or one "upon which Convocation could "properly declare its opinion to the Senate in accordance with "statute 61; but was a matter within the discretion of the "council of the particular school concerned".

Accordingly this application was made for an order of mandamus directing the Chairman of Convocation to summon without further delay an extraordinary meeting of Convocation in accordance with statute 62.

Pritt, K.C., and *Millner* for the applicant. [Their opening argument does not call for a report as the case was decided upon a point raised by counsel for the respondent chairman.]

Diplock, K.C. and *Boileau* for the respondent. This case does not raise the general question of the right of members of Convocation to cause an extraordinary meeting to be summoned. The issue is limited to whether it was proper that a particular motion should be submitted to Convocation. That is a matter of internal management, and the appropriate tribunal to determine it is not this court, but the Visitor of the university. Statute 6 states that H.M. in Council shall be the Visitor of London University, without any qualification; and therefore the Visitor has all the powers which normally attach to that office. Only two other statutes, 109 and 115, refer to the Visitor: they mention special powers and duties. But there is nothing in the Act or the statutes to limit his jurisdiction.

Wherever the Visitor has the usual power of dealing with domestic matters, the court will not interfere. The rights and duties of members of a corporation are eminently within normal visitatorial jurisdiction. That principle is unaffected by the fact that in this case London University was set up by Act of Parliament and not by charter: compare *Reg.* v. *Hertford College, Oxford* (9).

The point of this dispute is whether the respondent Chairman of Convocation was entitled, as such, to rule a certain motion out of order. A dispute of that character is one which falls within the jurisdiction of the Visitor, and therefore is one with which the court has no power to interfere. The court can by an order of mandamus call on the Visitor to a university to exercise his jurisdiction, but cannot by mandamus exercise a function of the Visitor for him.

[Counsel also referred to *Attorney-General* v. *Talbot* (10), *Attorney-General* v. *Smithies* (11), *Ex parte Berkhampstead School* (12) and *Attorney-General* v. *Stephens* (13).]

Millner in reply. The *Hertford College* case (14) cannot be relied on for the proposition that mandamus is invariably ruled out in university disputes. The judgment of Lord Coleridge, C.J., shows by implication that in certain cases the court might enforce by mandamus the performance of a legal duty (15).

All that the authorities show is that a Visitor's powers relate to domestic disputes. But London University is endowed by Parliamentary interest and statutory foundation with a more public character than institutions of private foundation. The real issue here is that statute 62 imposes a duty of a public or quasi-public character, a point of distinction from the *Hertford College* case (14), where the issue was plainly of a private domestic character.

The question whether the chairman was right to rule the particular motion out of order is not in point: the question is whether having regard to the mandatory terms of statute 62, he must call a meeting of Convocation when required to do so by over fifty members. It is submitted that statute 62 imposes a public duty which the court will enforce by mandamus.

---

(9) (1878) 3 Q. B. D. 693.
(10) (1747) 3 Atk. 662.
(11) (1836) 1 Keen 289.
(12) (1813) 2 V. & B. 134
(13) (1737) 1 Atk. 358.
(14) 3 Q. B. D. 693.
(15) Ibid. 701, 704.

Cur. adv. vult.

July 28. LORD GODDARD, C.J., reading the judgment of the court, referred to the facts, and continued:—Mr. Diplock, among the submissions that he desired to make on behalf of the Chairman of Convocation, objected that this was not a matter in which the court should act by way of mandamus, but that appropriate authority to deal with the question which had arisen was the Visitor of the university.

By the London University Act, 1926, s. 1, it is provided that "There shall be a body of Commissioners to be styled 'The "'University of London Commissioners'", whose names are set out in the statute; and by s. 4 it is provided that "subject "to the provisions of this Act, the Commissioners shall make "statutes for the University of London (in this Act referred to "as 'the University'), in general accordance with the recom"mendations contained in the Report of the Committee, subject "to any modifications which may appear to them to be expedient, "and, so far as may be necessary for giving effect to any of the "said recommendations, the Commissioners may, subject as "hereinafter provided, make statutes for any school of the Uni"versity, or for any other college, school, or institution for the "purpose of enabling it to become a school of the University".

By s. 5: "No statute or part of a statute made under this "Act shall have effect until it has been approved by His Majesty "in Council, but every statute or part of a statute so approved "shall, subject to the provisions of this Act, have effect notwith"standing anything in any Act of Parliament, charter, deed, or "other instrument whatsoever". It is common ground that the statutes had been duly approved by His Majesty in Council.

By s. 6 of the statutes of the university it is provided that "His Majesty in Council shall be the Visitor of the University". The only two statutes concerning the powers of the Visitor are Nos. 109 and 115; these confer some special powers, or mention some special duties of the Visitor; but there is nothing in the Act to show that there is any limitation imposed on the ordinary visitatorial powers of the Visitor.

I think it important to remember that mandamus is neither a writ of course nor a writ of right, but will be granted if the duty is in the nature of a public duty and specially affects the rights of an individual, provided that there is no more appropriate remedy. This court has always, I think, refused to issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a Visitor of a corporate body, the court will not interfere in the matter within the province of the Visitor; and especially is this so in matters relating to educational bodies such as colleges. I see no difference for this purpose between a college and a university. Any question that arises of a domestic nature is essentially one for a domestic forum, and this is supported by all the authorities concerning visitatorial powers and duties. The question has generally arisen with regard to the election to fellowships; but I see no difference in principle between the question whether a particular person ought to be elected to a fellowship and the question whether a particular person is a fit and proper person to be appointed or retained as a teacher at a university or a school.

Unless the question really does affect the suitability of the person in question to be a teacher at a college connected with the university, it would be difficult to see how the matter could be one which, in the words of statute 61, must be a matter relating to the university.

The authorities on the matter seem to be fairly consistent. The first case to which I refer is *St. John's College, Cambridge* v. *Todington* (16), where Lord Mansfield said: "The visitatorial "power, if properly exercised, without expense or delay, is useful "and convenient to colleges. However (be that as it may), we "must take it, as it is now established by law: and it is now "settled and established (since the case of *Philips* v. *Bury* (17) "in the House of Lords) that the jurisdiction of the Visitor is "summary and without appeal from it".

Philips v. *Bury* (17) did decide that the Visitor's decision was final, and indeed it is a very desirable thing that in a matter of this sort there should be some means of obtaining a final decision. The matter should not have to be brought before courts with the possibility of an appeal first to the Court of Appeal, and then to the House of Lords, on a matter which, after all, is a domestic matter referring to the government and internal affairs of the University of London.

The next case to which I refer is *Attorney-General* v. *Talbot* (18). There Lord Hardwicke decided that the powers of the Visitor were such that the Court of Equity would not interfere by injunction or otherwise: "If the Chancellor of this University "then is Visitor, the general powers of a Visitor are well known; "no court of law or equity can anticipate their judgment, or take "away their jurisdiction, but their determinations are final and

(16) (1757) 1 Burr. 158, 200.

(17) (1692) 4 Mod. 106.

(18) (1747) 3 Atk. 662, 673.

"conclusive. And it is a more convenient method of determination of controversies of this nature, it is at home, forum "domesticum, and final in the first instance, and they should be "adjudged in a short way secundum arbitrium boni viri; it is "true this power may be abused, but if it is exercised in a "discreet manner, it is a much less expense than suits at law, "or in equity; and in general, I believe, such appeals have been "equitably determined".

To the same effect is *Attorney-General* v. *Smithies* (19); and we were referred to *Reg.* v. *Hertford College, Oxford* (20), the importance of that case being that it shows that the same principles apply where the corporation is governed and set up by an Act of Parliament as when it is set up by a charter. There are also several cases in the books in which mandamus has been sought by either students or barristers directing the Inns of Court to admit them; but the court has always refused to grant a mandamus to the Benchers of the Inns, the method of questioning their decision now being well established as an appeal to the judges, not as a court, but in their capacity as Visitors of the Inns.

I may refer, as a matter perhaps of interest, to the fact that there is a case, *Thomson* v. *London University* (21), in which, to quote the headnote, "The University of London conferred "upon the plaintiff a gold medal, as being the candidate who had "obtained the highest number of marks in the examination of "1861 for the LL.D. degree. Two years afterwards it was discovered by the senate of the university that, according to the "construction put by the senate on the regulations for the LL.D. "examination, the examiners had miscarried in the mode which "they had adopted in ascertaining the highest number of marks; "and the senate thereupon determined to confer a second gold "medal upon the candidate to whom according to their view the "medal ought to have been awarded. The plaintiff filed his bill, "alleging, in effect, that before becoming a candidate he made "inquiry of the registrar of the university, and had been informed "by him that the examination would be conducted upon the "principle and the marks ascertained in the mode upon and in "which they were in fact subsequently conducted and ascertained, "and that he had become a candidate and paid his examination "fee upon that footing, and praying that the university might "be restrained from awarding such other medal:—*Held*, upon "demurrer, that the court had no jurisdiction to entertain the "suit, the matter being one solely within the jurisdiction of

---

(19) (1836) 1 Keen 289; 2 M. & C. 135.

(20) (1878) 3 Q. B. D. 693.

(21) (1864) 33 L. J. (Ch.) 625.

"the Visitor". That shows, therefore, the extensive power of the Visitor.

Of course, if a Visitor refuses to act, a mandamus may go to him calling upon him to act; but that is an entirely different matter. Here the statutes actually have been approved by the Visitor. Statutes 61 and 62 must be read together. [His Lordship read them, and continued:] It is obvious, therefore, taking those two statutes together, that the business to be considered must be a matter relating to the university.

The case, then, is that an officer of the university is alleged to have refused to perform a duty placed upon him by the statutes of the university; and that seems to me to be essentially a matter for the Visitor, because it is a domestic question. The officer objects to calling this meeting on the ground that the matter sought to be discussed is not a matter relating to the university. Whether it is such a matter is essentially a question for the Visitor, who is also presumed to understand the statutes generally relating to the university. He will have knowledge of the status of the particular school, which we have not gone into at any length, and which does not seem to be entirely clear.

For these reasons the court has come to the conclusion that this matter is one within the visitatorial jurisdiction of His Majesty in Council, and the application for a mandamus is therefore refused.

Application refused.

Solicitors: *Gaster & Turner; Field, Roscoe & Co.*

C. A.
1950
July 11.

Singleton and Jenkins, L.JJ.

WESTMINSTER AIRWAYS LD. *v.* KUWAIT OIL CO. LD.

[1949 W. 1441.]

Procedure—Discovery—Plaintiffs' claim for damage to aircraft—Defendants insured against third-party risks—Whether defendants entitled to claim privilege for correspondence with their insurers—R. S. C., Ord. 31, *r.* 19A (2).

The court has power under R. S. C., Ord. 31, r. 19A (2) in a proper case to inspect documents where a claim for privilege is set up against a claim for production of documents by the opposite party. There is, however, nothing in r. 19A (2) or in the authorities to constrain the court to hold that, in every case where a claim to privilege is made and disputed, the party seeking production is entitled to come to the court and demand as of right that the court should go behind the oath of the opposite party and itself inspect the documents. The question whether the court should inspect the documents is one for the discretion of the court and primarily for the judge of first instance. Each case must depend on its own circumstances. If, however, looking at the affidavit of documents, the court finds that the claim to privilege is formally correct and that the documents in respect of which it is made are sufficiently identified and are such that, prima facie, the claim to privilege would appear to be properly made in respect of them, then the court should, generally speaking, accept the affidavit as sufficiently justifying the claim without inspecting the documents.

A motor truck owned by the defendants ran into and damaged an aeroplane owned by the plaintiffs which had made a forced landing on a road in the principality of Kuwait. The plaintiffs brought an action for damages. The defendants in their affidavit of documents claimed privilege for the documents passing between themselves and their insurers, on the ground that they came into existence after litigation was in contemplation for the purpose of furnishing the defendants' solicitors with evidence and information to enable them to conduct the defence. The plaintiffs claimed that the correspondence between the plaintiffs and their insurers was not privileged, and submitted that in any event the court ought to look at the correspondence before deciding whether it was privileged or not.

Held, that prima facie, the correspondence was of a character in respect of which the claim to privilege was justified. The insurers were concerned in the matter only because they had agreed to indemnify the defendants against a claim in the nature of that which the plaintiffs were making, and, that being so, the fact that the defendants had communicated with the insurers indicated that a claim was anticipated. In such circumstances, a communication between the defendants and their insurers, whether directly or through their brokers, would be directed to whether the claim should be disputed or admitted, and, if disputed, how best to conduct the defence. The communications, being of that character, were well within the privileged area; the affidavit on its face made out a prima facie case of privilege; and in the circumstances the court would not look at the correspondence.

Anderson v. *Bank of British Columbia* (1876) 2 Ch. D. 644; *Jones* v. *Great Central Railway Co.* [1910] A. C. 4; *Birmingham and Midland Motor Omnibus Co. Ld.* v. *London and North Western Railway Co.* [1913] 3 K. B. 850; and *Adam Steamship Co. Ld.* v. *London Assurance Corporation* [1914] 3 K. B. 1256, considered.

APPEAL from Parker, J.

The plaintiffs, Westminster Airways Ld., claimed substantial damages from the defendants, Kuwait Oil Co. Ld., in respect of damage to an aircraft of theirs caused by a truck owned by the defendants. The following statement of the facts is taken substantially from the judgment of Singleton, L.J. The action was begun on May 12, 1949; the statement of claim was delivered on May 14 and the defence was delivered on June 10, 1949. Later an amended statement of claim was delivered on November 8, 1949. By the amended statement of claim the plaintiffs alleged that the defendants were the owners of a motor truck, and that the plaintiffs were at all material times the owners of a De Havilland "Dove" aircraft which was forced to land on a road in the district of Kuwait in the principality of Kuwait on the night of November 25, 1947, and whilst the aeroplane was stationary, the motor truck, which was then in the charge of the servant or agent, one Jackson, and driven by their servant or agent, one Hough, was driven into the aeroplane and caused it severe damage. By their defence the defendants admitted that they were the owners of the truck. They pleaded that neither of the individuals mentioned in the statement of claim as being in charge of, or as driving, the truck was their servant or agent, and they denied negligence.

On September 29, 1949, the defendants delivered a list of documents which was regarded by the plaintiffs' advisers as insufficient. The defendants' covering letter set out first a few documents, and then specified: "Documents for which privilege "is claimed" in four parts; one being: "Correspondence passing between the defendants and their insurers which by its "nature is privileged".

The plaintiffs contested the question of privilege. They applied for an affidavit of documents, and their application was supported by affidavit. On May 18, 1950, the master made an order in para. 1 of which he ordered discovery of certain documents mentioned in the application. As regards the documents in question, by para. 2 he ordered "That the defendants "do on four days' notice being given produce at the office of "Messrs. Hair & Co., solicitors for the said defendants . . . the "following documents, namely, correspondence between the "defendants and their insurers listed in the second part of the "defendants' list of documents dated September 29, 1949, and "that the plaintiffs be at liberty to inspect" etc.

The defendants appealed to Parker, J., in chambers, who adjourned the matter. At a later stage two affidavits (documents numbered 8 and 9 in these proceedings) were sworn by the secretary of the defendant company on June 6, 1950. On June 9, the matter came before Parker, J., again, and in the result he allowed the appeal so far as it related to para. 2 of the order of the master. It was against that part of his order that the plaintiffs now appealed.

The secretary of the defendant company in para. 2 of his affidavit (document 8) referring to the order of the master, said: "The defendant company have in their possession or power "documents passing between the defendants and their insurers "set forth in the schedule hereto". The schedule embraced some fifty documents, beginning with a letter of December 19, 1947. Paragraph 3 of his affidavit was in these terms: "The "defendant company object to produce any of the documents "set forth in the schedule hereto upon the ground that they "came into existence and were made after litigation was in "contemplation and in view of such litigation for the purpose of "obtaining and furnishing to the solicitors of the defendant "company evidence and information as to the evidence which "could be obtained and otherwise for the use of the solicitors "to enable them to conduct the defence in this action and to "advise the defendants". That claim was in a form which had been before the courts on more than one occasion.

The appeal of the plaintiffs was concerned only with the documents which were set forth in the schedule to that affidavit. The defendants had, in fact, disclosed the first document mentioned in the schedule, that was, a letter from the Tanker Insurance Co. Ld., insurance brokers of the defendant company, to the claims department of the Royal Insurance Co. Ld., dated December 19, 1947, which stated: "Dear Sirs, Motor Vehicle "Insurance, Kuwait Oil Co. Ld. We enclose herewith a copy "of a memorandum received today from Kuwait in connexion "with an accident occurring on November 25 last. Pending any "advices you may have, we are deferring acknowledgment of "their communication". The memorandum which was enclosed with that document was a letter from the defendant company's resident accountant at Kuwait to their London office, dated December 3, 1947. That memorandum, as well as another memorandum, was disclosed by the defendants in a list of documents in respect of which privilege was not claimed.

In the other affidavit (document 9) the secretary, having set out certain facts with regard to the ownership and use of the lorry, included in the schedule of documents, disclosed a memorandum No. A/1662 from the defendant company's resident accountant in Kuwait to the defendant company in London, dated November 27, 1947, and also a memorandum No. 1698 from the resident accountant to the defendant company in London, dated December 3, 1947, which memorandum was enclosed in the letter of December 19 referred to above. The affidavit referred to a number of other documents. The plaintiffs applied for, and had access to, those two memoranda and in particular that sent with the letter of December 19, 1947, that letter being the first document, among others, for which privilege had been claimed.

The schedule to the affidavit (document 8) had as its next item "Letter claims superintendent of Royal Insurance Co. to "Tanker Insurance Co., December 22, 1947". The next item was "Letter claims superintendent of Royal Insurance Co. to "Tanker Insurance Co., December 23, 1947". The next document was a letter from the defendant company, to one A. C. Wright of the Tanker Insurance Co., dated December 31, 1947.

Formal notice of claim in respect of the accident was given on December 29, 1947, that was before the date of the letter from the defendant company to Wright of the Tanker Insurance Co., who were acting as their insurance brokers.

It was made apparent from the memorandum (No. 1698) enclosed in the letter of December 19, 1947, to the defendants at their London office that there was more than a probability of litigation at the time of the writing of the memorandum, which was prepared in December, 1947.

That memorandum was as follows: "At about 7.30 p.m. on "November 25, a Dove aircraft belonging to the Westminster "Airways made a forced landing on the Bungan Magwa road "about 2 miles from Magwa. Through electric storms and inability to make contact with Basrah airport the pilot had lost "his bearings and landed where he did to inquire of his whereabouts from someone at Magwa. A few minutes later a pick-"up"—that was, the. truck—"coming from the direction of "Burgan crashed into the aircraft which was still on the road, "and caused extensive damage. The accident was peculiar, to "say the least of it, and we were advised by a member of the "staff of Airworks, who are here, that the Ministry of Civil "Aviation would probably require a court of inquiry. The "political agent was asked to do this and agreed but subsequently "stated that to take evidence on oath a case would have to be "raised against the driver of the vehicle who was Mr. H. H. "Hough, a driller, who incidentally had tendered his resignation "some few days previously. We were not prepared to state a case "against Hough but the pilot of the aircraft did so and Hough "was tried in the political agent's court for driving without due "care and in such a way as might cause hurt. The result of the "case was that Hough was found guilty and a fine of Rs. 500 "was imposed. The political agent has left Kuwait for a few "days, but on his return we will obtain from him a certified copy "of the particulars, evidence, etc., in the case and forward it "to you so that if any legal action follows the facts will be "available to you". That document had been disclosed, as had the earlier memorandum.

The formal claim against the defendants from Lloyd's sub-agent on December 29, 1947, stated: "Dear Sirs, Dove Aircraft "G/AKET. Under instructions from Lloyd's, London, we hereby give you formal notice of their intention to lodge a claim "against you for the loss of, and damage to, the above aircraft on "November 25, 1947".

C. N. Shawcross, K.C., and *J. R. Bickford Smith* for the plaintiffs. The question which arises is whether communications between a litigant and his insurers, who have agreed to indemnify him against claims, are privileged from discovery in the same way as communications between a litigant and his solicitors. Three points arise for consideration: first, can privilege be claimed for communications between a litigant and his insurers; secondly, if so, can that privilege be claimed for the correspondence in this case; thirdly, can the question whether this correspondence is privileged be decided without inspection. Parker, J., held that it could. It is submitted that this correspondence is not privileged. It gives information to the insurers not for the purposes of this action, but to enable them to decide whether they should take up the case. Such correspondence is not privileged. This appears from *Jones* v. *Great Central Ry. Co.* (1), which was followed in the unreported Irish case of *Coss* v. *National Maternity Hospital.* It is submitted that the court should look at this correspondence. In no reported case has the court refused to exercise the power conferred by r. 19A (2) of the R.S.C., Ord. 31 (2), and to look at the documents in question where a claim to privilege has been disputed. The facts of this case are very similar to those in *Anderson* v. *Bank of British Columbia* (3) where Sir George Jessel, M.R., ordered production of a letter written after litigation had become highly probable to the defendant bank from their branch office in connexion with the dispute.

Marven Everett for the defendants. It is submitted that, when considering whether correspondence between a defendant and his insurers is privileged, it should be remembered that today the relationship between insurers and their customers is such that in fact the insurers are in many cases the real defendants to the action. Rule 19A (2) of Ord. 31 confers a discretion on the judge, and it is submitted that the manner in which he exercises his discretion should not be interfered with unless it can be shown, which the plaintiffs have not done here, that he went wrong in principle. A claim that a document is privileged has to be made by affidavit. If the claim is properly made prima facie the court should not go behind it unless there be something to raise the suspicion that the claim is not justified. *Jones* v. *Great Central Ry. Co.* (4) was a case on its own facts, and is distinguishable from the present case. The documents in that case were not brought into existence to assist the plaintiff's legal

---

(1) [1910] A. C. 4.

(2) R. S. C., Ord. 31, r. 19A (2): "Where on an application for an order "for inspection privilege is claimed "for any document, it shall be lawful for the court or a judge to "inspect the document for the purpose of deciding as to the validity "of the claim of privilege".

(3) (1876) 2 Ch. D. 644.

(4) [1910] A. C. 4.

C. A.
1950

WESTMINSTER AIRWAYS LD. v. KUWAIT OIL CO. LD.

advisers. In the present case this correspondence was entered into with a view to assisting the defence to the action which it was known was then in contemplation. This case is within the principle applied in *Birmingham and Midland Motor Omnibus Co. Ld.* v. *London and North Western Ry. Co.* (5), and *Adam Steamship Co. Ld.* v. *London Assurance Corporation* (6).

SINGLETON, L.J., stated the facts and continued:—It is obvious from the nature of the accident and from the document of December 3, 1947, that litigation was anticipated before the actual claim was made. Mr. Shawcross, on behalf of the plaintiffs, claims that the further documents set out in the schedule to the affidavit (document 8) are not privileged, and, furthermore, he submits that the court ought to look at them before deciding that they are privileged. Parker, J., did not think it necessary so to do, nor do I. The court ought to regard the defendants' affidavit as covering the question, unless there is some reason to cast doubt upon it. The defendants have now disclosed documents up to a time when it was clear beyond doubt, if it was not clear before, that litigation was imminent, and the documents thereafter came into existence for the purpose of providing information on which the defendants' solicitors could meet any claim which was made, and which they anticipated would be made.

Mr. Shawcross, in support of the appeal, relied chiefly on two authorities. The first is *Jones* v. *Great Central Ry. Co.* (7). In that case, to quote the headnote: " A member of a trade union " who had been dismissed by his employers furnished the union " authorities, as required by the rules, with information in writing " to enable the authorities to decide whether he was entitled to " bring an action for wrongful dismissal at the expense of the " union and with the assistance of their solicitor. The informa- " tion comprised the evidence available in support of the action " and the names of the witnesses. The union authorities sanc- " tioned an action brought by the member, with their solicitor " acting as solicitor for the plaintiff. Upon a summons for " discovery taken out by the defendants, *Held*, that the letters " containing the information did not fall within the established " rule as to the privilege between solicitor and client and must " be produced ".

Lord Loreburn, L.C., said (8): " The question arises as " follows: Godfrey Jones, a servant of the defendant railway " company, had a dispute with his official superiors which ended " in his dismissal. He thought himself aggrieved and brought

---

(5) [1913] 3 K. B. 850.
(6) [1914] 3 K. B. 1256.
(7) [1910] A. C. 4.
(8) Ibid. 5.

"this action. He was a member of a trade union on terms which "entitled him to a variety of benefits, and among others to the "right of receiving legal assistance in case of unjust dismissal. "In such case he was bound by the rules to give full particulars "to the authorities of the trade union, and the sanction of the "executive committee or of the general secretary was needed "before a solicitor was engaged. In the present instance certain "letters passed between Godfrey Jones and the officials of the "union, containing information about the dispute. They were "written before any action was brought in order to satisfy the "union authorities that they ought to sanction the employment "of a solicitor and to furnish information by which the solicitor "should be enabled to conduct the action which the workman "contemplated and desired". The Lord Chancellor held, and the other Law Lords agreed, that those documents were not privileged—that they were not within the rule giving them privilege. That case seems to me to be quite different from the case before this court.

The other authority was *Anderson* v. *Bank of British Columbia* (9), in which case a bill was filed against a banking company to compel them to replace a sum of money alleged to have been improperly transferred by them from one account to another at their branch bank in Oregon. Before the bill was filed, but after litigation had become highly probable, the manager in London telegraphed to the manager in Oregon to send full particulars of the whole transaction. On an application by the plaintiffs in the suit for production of documents, the bank resisted production of the letter sent in answer, as being privileged. It was held that the letter was not privileged, and must be produced.

Mr. Shawcross relied on the judgment of James, L.J., in the Court of Appeal, but it is useful to look also at that of Sir George Jessel, M.R. (10). The Master of the Rolls, having referred to the words of Lord Brougham in *Greenough* v. *Gaskell* (11) and to Lord Cottenham, L.C.'s summary of that decision in *Reid* v. *Langlois* (12) went on to say: "The object and "meaning of the rule is this: that as, by reason of the com"plexity and difficulty of our law, litigation can only be properly "conducted by professional men, it is absolutely necessary that "a man, in order to prosecute his rights or to defend himself "from an improper claim, should have recourse to the assistance "of professional lawyers, and it being so absolutely necessary, "it is equally necessary, to use a vulgar phrase, that he should "be able to make a clean breast of it to the gentleman whom he "consults with a view to the prosecution of his claim, or the

---

(9) 2 Ch. D. 644.
(10) Ibid. 648, 649.
(11) (1833) 1 My. & K. 98.
(12) (1849) 1 Mac. & G. 627.

"substantiating his defence against the claim of others; that "he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications "he so makes to him should be kept secret, unless with his "consent (for it is his privilege, and not the privilege of the "confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule. Now, "as to the extent of the rule. It goes not merely to a communication made to the professional agent himself by the client "directly, it goes to all communications made by the client to "the solicitor through intermediate agents, and he is not bound "to write letters through the post, or to go himself personally "to see the solicitor; he may employ a third person to write the "letter, or he may send the letters through a messenger, or he "may give a verbal message to a messenger, and ask him to "deliver it to the solicitor, with a view to his prosecuting his "claim or of substantiating his defence".

The judgment of James, L.J., which Mr. Shawcross read, appears to me, if I may say so, to limit the privilege rather more strictly than has been done in some of the other cases. I would quote this short passage (13): "Looking at the dicta and the "judgments cited, they might require to be fully considered, "but I think they may possibly all be based upon this, which is "an intelligible principle, that as you have no right to see your "adversary's brief, you have no right to see that which comes "into existence merely as the materials for the brief".

It was held on the facts of that case both by the Court of Appeal, and by Sir George Jessel, M.R., in the court of first instance, that the document, the report from the manager in Oregon to the general manager in London, was not privileged. Again, I think that that case can be distinguished from this; and in matters of this kind which, as Mr. Everett put it, involve a certain amount of discretion, it really is a question on which side of the line the case falls.

I need only refer to two of the authorities cited in support of the order of Parker, J. The first is *Birmingham and Midland Motor Omnibus Co. Ld.* v. *London and North Western Ry. Co.* (14).

The headnote to that case in the Law Reports reads: "In an "affidavit of documents on behalf of the defendants in an action "of negligence privilege was claimed for certain documents in a "schedule to the affidavit on the ground that 'they came into "'existence and were made after this litigation was in contem"'plation and in view of such litigation for the purpose of "'obtaining for and furnishing to the solicitor of the defendant

---

(13) 2 Ch. D. 644, 656.

(14) [1913] 3 K. B. 850.

" ' company evidence and information as to the evidence which " ' could be obtained and otherwise for the use of the said " ' solicitor to enable him to conduct the defence in this action " ' and to advise the defendants '. A judge at chambers, after " inspecting the documents under the provisions of Ord. 31, " r. 19A (2) made an order by which some of the documents " were protected and others were ordered to be disclosed, the " dividing line being drawn at the date on which the plaintiffs " first preferred their claim against the defendants: *Held*, first, " that the judge at chambers and the Court of Appeal were " entitled under Ord. 31, r. 19A (2), to inspect the documents for " the purpose of deciding on the validity of the claim of privilege, " as no particular formula of words in the affidavit could be conclusive against evidence furnished by the documents themselves; and, secondly, after inspecting the documents, that protection had been appropriately claimed for them by the affidavit " and that the dividing line drawn by the judge in chambers was " inappropriate in the particular case. It is not necessary that " the affidavit should state that the information was obtained " ' solely ' or ' merely ' or ' primarily ' for the solicitor, if it was " obtained for the solicitor in the sense of being procured as " materials upon which professional advice should be taken in " proceedings pending, or threatened, or anticipated ".

Three matters come to mind in regard to that decision. The first is that the claim of the defendants to privilege was upheld upon the wording of the affidavit, and that the wording of the affidavit in the present case is similar in all respects. Secondly, the rule itself makes clear that it is open to the court to look at the documents themselves in order to ascertain whether they are privileged or not, if the court thinks it necessary so to do. Thirdly, the argument of Mr. Shawcross that one cannot determine whether a document is privileged or not without looking at it must be considered in regard to the affidavit, and it is not necessary that the affidavit should state that the information is obtained solely for the use of the solicitor. There may be other purposes allied to that purpose of the same kind.

In the course of the judgment in that case Buckley, L.J., said (15): " The question for determination here is, I think, " whether the documents in question fall within the principle of " *Anderson* v. *Bank of British Columbia* (16), or within that of " *Southwark and Vauxhall Water Co.* v. *Quick* (17) ". He continued, referring to the former case (16): " The resulting " document was not privileged, and this upon the ground that

---

(15) [1913] 3 K. B. 850, 856.

(16) 2 Ch. D. 644.

(17) (1878) 3 Q. B. D. 315.

C. A.
1950

WESTMINSTER AIRWAYS LD. *v.* KUWAIT OIL CO. LD.

Singleton, L.J.

"it was not a confidential communication obtained by or for the "solicitor or as materials forming, as it is called, part of the "brief of the party making the affidavit".

Hamilton, L.J., said (18): "Although an affidavit of "discovery cannot be controversially challenged, as by cross-"examination, counter-affidavit, or administration of interroga-"tories, *Jones* v. *Monte Video Gas Co.* (19) lays down authorita-"tively how and how far it can be challenged otherwise: 'If "'from the affidavit itself, or from the documents therein "'referred to, or from an admission in the pleadings of the "'party from whom discovery is sought, the master or judge is "'of opinion that the affidavit is insufficient, he ought to make "'an order for a further affidavit, but except in cases of this "'description no right to a further affidavit exists'. Now that "r. 19A (2) has given the judge power to inspect documents as "to which there is a disputed claim of privilege, the documents "which are not disclosed are available, either at the instance of "the opposite party or in the discretion of the judge himself, as "material on which to show the insufficiency of the affidavit, "because both are equally 'documents therein referred to'".

Discussing the facts of the case, Hamilton, L.J., said (20): "Hence I should not have been disposed to interfere with the "order which Bucknill, J., in his discretion made as to particu-"lar documents, but on examining them I think he has proceeded "on a wrong principle. He has drawn his distinguishing line by "the date at which the defendants first received a letter of claim "from the plaintiffs, a test which, though often unexceptionable, "and particularly so in mercantile disputes, is inappropriate in "such a case as the present, where, as in *Collins* v. *London* "*General Omnibus Co.* (21), at the very moment when the "accident occurs an ordinary employee can anticipate that "litigation in respect of it will probably ensue".

As I have said, the formal notice of claim in the case under appeal was not made until December 29, but if ever a claim could have been anticipated after an accident, I should think that it was so here. It was, indeed, an unusual case; very heavy damage was done to the aircraft, so it is claimed by the statement of claim, and I should think myself that everyone must have anticipated at once that a claim would follow. The privilege claimed is in respect of documents coming into existence at a date considerably after the date of the accident.

The other case upon which Mr. Everett relies is *Adam Steamship Co. Ld.* v. *London Assurance Corporation* (22). It is not necessary to go into the facts, but I draw attention to the judgment of Buckley, L.J., where, of an affidavit in much the same form as this, he said (23): "To my mind that is a complete and "satisfactory claim of privilege based upon the grounds recog-"nized in *Birmingham and Midland Motor Omnibus Co.* v. "*London and North Western Ry. Co.* (24). The question to be "answered is this: Is the judge satisfied that the documents, "which are sought to be protected, were bona fide obtained for "the solicitor, though not actually by him? Were they docu-"ments obtained for the purpose of being used, not necessarily "in an existing litigation, but in an anticipated litigation?"

---

(18) [1913] 3 K. B. 850, 858.
(19) (1880) 5 Q. B. D. 556.
(20) [1913] 3 K. B. 850, 861.
(21) (1893) 63 L. J. (Q. B.) 428.
(22) [1914] 3 K. B. 1256.

Kennedy, L.J., said (25): "Assuming that to be so, these "letters were written after the first step had been taken which "put the parties, as has been said, at arm's length. The defen-"dants in their list of documents, which is to be treated as if it "were an affidavit of documents, claim privilege for them. To "my mind they clearly appear privileged. They were letters "which passed between the Salvage Association and their agents "in Perim for the purpose of being used by the underwriters in "a litigation which was obviously threatened and impending, "and they were letters written for the purpose of obtaining or "giving advice on the subject; and counsel has assured us that "the only letters for which privilege is claimed are of that "character. Upon principle as well as upon authority the "documents are privileged".

In my view, the documents set out in the schedule to the affidavit (document 8) fall within the line of authorities relied upon by the defendants rather than upon those relied upon by the plaintiffs, and I am of opinion that the order of Parker, J., was right, and that the claim to privilege is established. I do not find it necessary, for the reasons given, to look at the documents themselves. I am satisfied on the whole that this appeal ought to be dismissed.

JENKINS, L.J. I agree. The claim for further discovery, as developed in argument before us, was not to the effect that the claim to privilege was wholly bad on the face of it, with the result that the whole of the documents to which that claim related should be disclosed, but was argued on the lines that here was a dubious claim to privilege which might, or might not, be justified, and that the proper course, in the circumstances, was for the court itself to inspect the documents and decide how far, if at all, they were privileged documents.

It is not open to doubt that under the R. S. C., Ord. 31,

---

(23) [1914] 3 K. B. 1256, 1259.

(24) [1913] 3 K. B. 850.

(25) [1914] 3 K. B. 1256, 1260.

C. A.
1950

WEST-MINSTER AIRWAYS LD.
v.
KUWAIT OIL CO. LD.

Jenkins, L.J.

r. 19A (2), the court has power, in a proper case, to inspect documents where a claim of privilege is set up against a claim for inspection of documents by the opposite party. *Birmingham and Midland Omnibus Company Ld.* v. *London and North Western Ry. Co.* (26) affords an illustration of a case in which the court did take that course, and, as it happened, having done so, held that the claim to privilege was well founded. But there is nothing in the rule, or in the authorities, to constrain the court to hold that, in every case where a claim to privilege is made and disputed, the party seeking production is entitled to come to the court and (as it were) demand as of right that the court should go behind the oath of the opposite party and itself inspect the documents. The question whether the court should inspect the documents is one which is a matter for the discretion of the court, and primarily for the judge of first instance. Each case must depend on its own circumstances; but if, looking at the affidavit, the court finds that the claim to privilege is formally correct, and that the documents in respect of which it is made are sufficiently identified and are such that, prima facie, the claim to privilege would appear to be properly made in respect of them, then, in my judgment, the court should, generally speaking, accept the affidavit as sufficiently justifying the claim without going further and inspecting the documents.

Considering this matter from that point of view, I find that the documents in respect of which privilege is claimed are communications passing between the defendant company and their insurance brokers and insurers with respect to the accident which gave rise to the claim in the action, and that the claim to privilege in respect of those communications is made in the usual and regular form.

In my judgment, prima facie those documents are of a character in respect of which the claim to privilege is justified. The insurers, after all, are concerned in the matter only because they have agreed by the contract of insurance to indemnify their assured against claims of the character in question. That is how they come into it. That being so, the very fact that the insurance company are communicated with at all indicates that a claim is anticipated. Moreover, in the present case the circumstances were such that there could be no doubt, even before a formal claim was lodged, that a claim would ensue. Prima facie, in such circumstances a communication between the assured and the insurance company, whether direct or through the assured's brokers, would be directed to the question whether the claim should be disputed or admitted, and if it was to be disputed, how best to conduct the defence.

(26) [1913] 3 K. B. 850.

C. A.
1950

WEST-MINSTER AIRWAYS LD.
v.
KUWAIT OIL CO. LD.

Jenkins, L.J.

If the communications were of that character, then, in my judgment, they would be well within the privileged area, and the deponent in his affidavit claims that they were in fact within the privileged area by making in respect of them the claim to privilege in the usual general form. In those circumstances, it seems to me that, on the face of the affidavit here, a prima facie case of privilege is made out.

Mr. Shawcross says the court ought to go behind that claim, because the insurance company are not concerned, or are not primarily concerned, with the defence of the expected action, or with the collecting of information and advice to that end, unless and until they have admitted liability. He therefore in effect invites the court to read through the correspondence and find out when it was that the insurance company, having admitted liability, identified themselves, so to speak, with the defendants' side of the matter. He was, as I understood him, prepared to agree that, after the point was reached, what ensued would be privileged from discovery. In my judgment, this suggestion of a possibility of a dispute as to liability on the part of the insurance company is not enough to make it proper for the court to go behind the affidavit in the present case. There is, in fact, no reason to suppose that the insurance company ever did dispute liability; and, on the other hand, it is on the whole unlikely that they would ever categorically, and in so many words, have said to the defendants: "We acknowledge that we are liable to "indemnify you". In the circumstances of this case, therefore, there seems no reason to suppose that the search we are invited to embark upon by Mr. Shawcross would result in arriving at the dividing line which he suggests.

As my Lord has said, the whole of this correspondence took place after it had become obvious from the accident itself that a claim was likely to ensue; and, for the reasons stated, I think that, in the circumstances of this case, the judge having exercised his discretion in the matter, the order which he has made should stand.

I should, perhaps, mention a case from Southern Ireland, *Coss* v. *National Maternity Hospital*, a decision of Nixon, J., which has not yet found its way into the reports. It is of interest because the judge had, in an accident case of some sort, to consider the question of privilege in regard to correspondence between an insurance company and the defendants and their solicitors; so he had before him the very case with which we are here concerned.

The judge there held, with regard to the correspondence, that the proper course for him to take was to look at the documents under the general power given by the corresponding rule in Southern Ireland, and he said: "So far as a line of demarcation

C. A.
1950

WESTMINSTER AIRWAYS LD.
v.
KUWAIT OIL CO. LD.

Jenkins, L.J.

"may apply, I conceive it should not have reference to the date "of the making of a claim by the plaintiffs, but to the point of "time, if ascertainable, at which the insurance company ceased "to be interested or concerned in the matter from the point of "view of their own liability to their insured, and acquired instead "the character of agents, even prospectively, for the legal "advisers of the defendants. Having inspected the documents, "I think the line of demarcation should be drawn at the letter of "August 23, 1946, from the insurance company to the assistant "secretary of the defendants. The plaintiffs are entitled, in my "view, to inspection of documents within the description in "item 21 up to and including that date".

The judge there thus took the view which we were invited by Mr. Shawcross to adopt. With respect to the judge, I think that that is too narrow a view to form the foundation of any general rule. After all, it must be remembered that the documents are documents with respect to which privilege has been claimed on oath, and for the reasons given they are documents in respect of which, prima facie, the claim to privilege would appear to be proper. I therefore cannot see that it would be right to lay down any general rule to the effect that in all such cases it is necessary to peruse the document for the purpose of arriving at a line of demarcation such as the judge in Southern Ireland described.

Of the authorities cited to us, it seems to me that the one nearest in point is the *Adam Steamship Company Ld.* v. *London Assurance Corporation* (27), in which the Court of Appeal, looking at the affidavit and the nature of the documents, held—so far as appears from the report without inspecting them—that the claim to privilege made in the affidavit was properly made, and disposed of the matter on that footing.

I agree with my Lord that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *William Charles Crocker; Hair & Co.*

B. A. B.

---

(27) [1914] 3 K. B. 1256.

FOSTER *v.* ROBINSON.

C. A.

1950
June 19,
20, 21.

Evershed M.R.,
Cohen and
Singleton L.JJ.

Landlord and tenant—Cottage let at rent—Subsequent arrangement for tenant to remain on till his death without paying rent—Daughter as administratrix claiming benefit of original contractual tenancy—Surrender by operation of law—No continuing tenancy under the Rent Restriction Acts.

Shortly after the end of the first world war the plaintiff took over the management of a farm and let a cottage near by to a man who worked on the farm at a rent of 3*l.* 5*s.* a half-year. Later the plaintiff let the farm but the tenant of the cottage continued to work till, in 1946, he became unfit to do so by reason of age and infirmity. The plaintiff then told him that the existing tenancy would cease but that he could live at the cottage rent free till he died. The tenant accepted that offer and lived in the cottage without paying rent till he died. The defendant, his daughter, had lived in the cottage for nine years, and, on her father's death, she took out letters of administration of his estate and claimed to remain on at the cottage paying the old rent. In proceedings by the plaintiff to recover possession,

Held, that the plaintiff was entitled to possession on the grounds that the original tenancy had, as a result of the arrangement in 1946, been surrendered by operation of law, and that this was so although the tenancy was one to which the Rent Restriction Acts had applied.

Metcalfe v. *Boyce* [1927] 1 K. B. 758 and *Turner* v. *Watts* (1928) 44 T. L. R. 337 applied.

APPEAL from Judge Shove, sitting at Scunthorpe and Brigg county court.

The plaintiff, William Henry Foster, took over from his father after the war of 1914–1918 the working of a farm at New Barnetby, Lincolnshire. He was the absolute owner of a cottage near by, and he let it to one Henry Robinson, who was working on the farm, at the rent of 3*l.* 5*s.* each half-year. Later the plaintiff let the farm to one Spilman, and Robinson worked for him till May, 1946, when he ceased work owing to age and infirmity. He paid a half-year's rent on May 6, 1946. A few days later the plaintiff, out of consideration for his past services, arranged to allow him to remain on at the cottage without paying rent until his death. Robinson died on January 15, 1950.

His daughter, the defendant Maud Robinson, had then been living in the cottage for nine years with her father. On February 18, 1950, the defendant took out letters of administration of her father's estate. The plaintiff informed her that she could remain in the cottage only until April 6, 1950, when he was going to sell it; but she refused to leave. The plaintiff therefore brought proceedings for possession. The defendant contended that, while the plaintiff had not demanded rent since May, 1946, her father's contractual tenancy was still in existence at the time of his death and had become vested in her as his administratrix. She relied on the Rent Restriction Acts.

At the hearing the plaintiff gave the following evidence as to the arrangement come to with Robinson in May, 1946: "I told "him the existing tenancy would cease and I would charge him "no more rent and he could live there the rest of his life rent "free. He said 'Thank you very much', and said he was very "pleased to accept the condition". There was no other evidence of what the arrangement was.

The county court judge said that the plaintiff impressed him as an honest and fair man and one extremely unlikely to take any unfair advantage. He thought the agreement come to was a great deal more than an agreement for the reduction or remission of rent. The express or primary condition was that the tenancy was to cease. The tenant then enjoyed the protection of the Rent Restriction Acts, but after that arrangement rent was neither demanded nor tendered. In his opinion the tenant became, as the result of the arrangement, a mere licensee with permission to reside in the cottage for the rest of his life, with the result that the Rent Restriction Acts had no application. The agreement made between the plaintiff and the tenant was acted on until the latter died, and the defendant was therefore, in his view, estopped from asserting that a tenancy existed. An order for possession within one month was made. The defendant appealed.

Michael Hoare for the defendant. It is contended that there was no surrender of the contractual tenancy as a result of the arrangement made in May, 1946. The submissions for the defendant are (1.) that the words used at the interview did not create a valid tenancy for life rent free; (2.) the words and form used were appropriate only to create a tenancy at will; (3.) the acceptance of the tenancy did not operate to put an end to the contractual tenancy from year to year; (4.) the agreement was for the tenancy to continue at a reduced rent: this was not an agreement that the contractual tenancy should cease and a new tenancy be created on fresh terms; (5.) the defendant is not estopped from denying the efficacy of the alleged surrender; (6.) there was no consideration for the plaintiff's promise to afford the tenant occupation for life rent free; (7.) the bargain on which the plaintiff relies as a surrender would be one by which Robinson purported to contract out of the Rent Restriction Acts. In the absence of express and effective surrender by the tenant of the protected tenancy, it must remain undisturbed, even though

C. A.

1950

FOSTER
v.
ROBINSON.

the new arrangement purported to create a tenancy at a rent less than two-thirds of the rate to which under s. 12, sub-s. 7, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the Rent Acts would not apply.

As to point (1.) there are two reasons why a tenancy for life is not created: (*a*) a grant of it would have to be in writing; and (*b*) the special words required to create a tenancy for life were not used. The grant must be for a specified number of years, if the tenant lived so long. Again, the contractual tenant had the protection of the Rent Restriction Acts, and there is no case where a surrender has operated in respect of a protected tenancy. It is impossible to surrender a protected tenancy except by giving up possession, and there is a locus pœnitentiæ for a protected tenant so that he can, after purporting to give up the tenancy, change his mind: see *Brown* v. *Draper* (1).

[EVERSHED M.R. Was there not an agreement that the contractual tenancy should cease?]

It is true that the county court judge has found that to be the effect of the oral agreement. The effect of the agreement was merely to continue the tenancy at a reduced rent and not to terminate the tenancy: see *Buttery* v. *Pickard* (2); and see Woodfall on Landlord and Tenant (24th ed.), p. 899, as to the effect of an invalid new lease.

It is now proposed to cite authorities in support of the points being taken, and then to refer to cases cited by the county court judge, some of which support the defendant's case and others of which are distinguishable. At most all that resulted was a tenancy at will: see *Buck* v. *Howarth* (3).

[EVERSHED M.R. Is there authority on surrender showing whether the tenancy from year to year could be surrendered by operation of law without the need of any writing?]

The first case is *Canterbury Corporation* v. *Cooper* (4), where it was intended to create a conditional surrender, the condition being the grant of a new lease. Here there was merely a continuance of the lease at a reduced rent: *Crowley* v. *Vitty* (5). In *Lyon* v. *Reed* (6) a surrender by operation of law of an old lease was implied when a new lease was granted, but it is there laid down that in order that there should be a surrender there must be some act of notoriety done by the tenant. That was not so here as the tenant simply remained on in the cottage but paid no rent as he was told that he need not do so. There must be some act visible to a bystander. This case shows that the matter really rests on estoppel: *In re Young, Ex parte Vitale* (7); *Wallis* v.

---

(1) [1944] K. B. 309.
(2) (1945) 62 T. L. R. 241.
(3) (1947) 63 T. L. R. 195.
(4) (1909) 100 L. T. 597.
(5) (1852) 7 Ex. 319.
(6) (1844) 13 M. & W. 285, 306
(7) (1882) 47 L. T. 480.

Hands (8). *Oastler* v. *Henderson* (9) shows that there must be something amounting to a taking of possession. There was nothing of the kind here: see also, on what amounts to surrender by operation of law, *Peter* v. *Kendal* (10). In *Metcalfe* v. *Boyce* (11) there was a change from being the tenant of one party to being the servant of another. The real question is whether there has been livery of seisin: see *Fenner* v. *Blake* (12). All that the plaintiff claims to have said in his conversation with Robinson was "I told him his tenancy had ceased". The only other case relating to surrender is *Turner* v. *Watts* (13), and there the payment of no rent was treated as equivalent to payment of rent at less than two-thirds of the rates.

[He also referred to *Waller* v. *Thomas* (14).]

J. P. Widgery for the plaintiff. The only question is whether the contractual tenancy came to an end. If the court were of opinion that it was continuous until now, there would be no answer to the appeal. In fact, however, the county court judge rightly held that what occurred in May, 1946, amounted to a valid surrender by operation of law of the yearly tenancy.

[EVERSHED M.R. Can you say that there was a giving up of possession within *Lyon* v. *Reed* (15)? On that it might be material whether the tenant had the protection of the Rent Restriction Acts.]

It is contended that the tenant had no more than a contractual tenancy which could be surrendered by operation of law. It has been suggested on the strength of what was said in *Lyon* v. *Reed* (15) that there could be no surrender by operation of law without some act of notoriety. But other cases that have been cited show that where any arrangement has been entered into between landlord and tenant inconsistent with the existing contractual tenancy the tenant is estopped from setting up the contractual tenancy, and that applies to his representative also.

[SINGLETON L.J. There was no act of notoriety in *Metcalfe* v. *Boyce* (16).]

A contractual tenancy can be brought to an end in the ordinary manner unless a statutory tenancy arises by the tenant staying on in occupation after notice to quit: *Turner* v. *Watts* (17). There was here a clear surrender by operation of law.

EVERSHED M.R. This has proved a difficult case. I have come to the conclusion that there is no ground for disturbing the decision of the county court judge. I make it plain at the outset that I regard the case as one which turns on a question of fact, and that there was evidence to support the essential finding of fact of the county court judge. I say that although I am not unmoved by the point made by Mr. Hoare that, if this decision is supported, landlords who make a practice of studying decisions under the Rent Acts may seek to improve their position by making arrangements with their tenants based on this decision so as to deprive them of the protection which the Acts are intended to give them.

---

(8) [1893] 2 Ch. 75.
(9) (1877) 2 Q. B. D. 575.
(10) (1827) 6 B. & C. 703.
(11) [1927] 1 K. B. 758.
(12) [1900] 1 Q. B. 426.
(13) (1928) 44 T. L. R. 337.
(14) [1921] 1 K. B. 541.
(15) 13 M. & W. 285.
(16) [1927] 1 K. B. 758.
(17) 44 T. L. R. 337.

The main point which Mr. Hoare has argued is that the transaction relied upon by the landlord was aimed at a "contracting out of the Rent Acts", by doing something meant to circumvent the duty imposed by those Acts upon the court. If that were the effect of the transaction, it might well be ineffective. According to s. 3, sub-s. 1, of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, "No order or "judgment for the recovery of possession of any dwelling-house "to which the principal Acts apply or for the ejectment of a "tenant therefrom shall be made or given unless . . .". The effect of this is that by no arrangement can the court be empowered in the case of a dwelling-house and its tenant falling within the ambit of the Acts to make an order for possession save when the conditions laid down in the sub-section are satisfied. I should be the last to suggest that the court should depart from that general principle, and indeed it would be outside its competence to do so. Section 3 presupposes that there is a dwelling-house to which the Act applies, let to a tenant as such. The real question in this case is, I think, whether there was at the relevant date a letting to a tenant of a dwelling-house within the scope of the Act.

Another general point to which I will refer in order to dispose of it is of the same character. In *Brown* v. *Draper* (18) Lord Greene M.R., delivering the judgment of the court, pointed out that in the case of a rent-controlled property there are only two ways by which a tenant whose contractual tenancy has come to an end can lose the protection of the Act: one is by his giving up possession, the other is by his having an order made against him by the court. As Mr. Widgery pointed out, that observation in terms related to the case of a tenant whose contractual tenancy had come to an end, in other words to the case of a statutory tenant; and in the present case the only question open in this court is whether the original contractual tenancy still subsisted at the date of the tenant's death. It is no part of the case made before us that the tenant was a statutory tenant at his death, but only that he was still a contractual tenant.

(18) [1944] K. B. 309.

C. A.
1950

FOSTER
v.
ROBINSON.

Evershed M.R.

It is fair to say, however, that the observation of Lord Greene M.R. is true generally, and that in the case of a rent-controlled house there must be either an actual yielding up of possession, or its equivalent, by the tenant, or an order against the tenant which the court has power to make. Those are the only two ways in which the protection of the Acts can be lost. But all that depends on there being a house let as a dwelling-house within the meaning of the Acts and subject to their control.

[His Lordship referred to the facts, in particular to the arrangement between the plaintiff landlord and the tenant, and continued:] The judge has found as a fact that there was no question of the plaintiff's trying to get any unjust advantage. Indeed, said the judge, " he impressed me as an honest and fair " man and one extremely unlikely to take any unjust advantage ". The judge also found as a fact that the agreement was a great deal more than a mere agreement for the reduction or remission of rent, and that its express and primary condition was that the deceased's tenancy was to cease. All those matters were questions of fact. The plaintiff's evidence was the only oral evidence of the arrangement that could be given, as the tenant died at the beginning of this year. But the judge referred to one piece of corroboration: for many years the practice had been for the rent to be paid and receipts given regularly half-yearly. The last receipt produced was dated May 2, 1946, being a receipt signed by Foster for 3*l.* 5*s.* 0*d.*; and it is a fact that thereafter the old practice of tendering rent and obtaining a receipt stopped altogether. The payment of rent ceased, and there was never any demand for, or payment or tender of, rent. So far, then, as the transaction was to the advantage of the deceased, the advantage was enjoyed.

The argument for the defendant has been put on two grounds. First, it is said that the transaction was ineffective according to law to amount to a surrender and therefore to a determination of the existing contractual agreement. That is an argument independent altogether of the effect of the Rent Restriction Acts. Secondly, it is said that, even if, apart from the Rent Acts, it would have been so effective, the prohibitive effect of the Rent Acts to which I have already alluded made it ineffective in this case. I will deal with both points in that order.

It is first important, I think, to notice that we are concerned here with a situation which, so far as the evidence is concerned, appears to have been contractual from the start. There is no evidence that there was ever any demise, any lease, at any time of the premises. There is, indeed, no evidence that there was ever any written contract of tenancy. We must take it that the position immediately before this interview of May, 1946, was that the tenant was a yearly tenant or a tenant from year to year of the cottage. The only significance of that is that it makes it rather more easy to draw the inference or conclusion that there was in May, 1946, a surrender by operation of law, there being then no existing estate or demise which might require a more formal or precise transaction. It is clear that there was no surrender by express document. If there was a surrender at all, it was by operation of law.

That there may be a surrender apart from any writing is clear, and that condition is expressly preserved by s. 52 of the Law of Property Act, 1925. What, then, amounts to a surrender by operation of law? We have been referred to many cases, including *Lyon* v. *Reed* (19), and to the well-known judgment of Parke B. in that case. I think that for present purposes it is sufficient to refer to Foa's Law of Landlord and Tenant (7th ed.), pp. 617 and 618: "It has been laid down that in order to constitute a surrender by operation of law there must be, first, an act of purported surrender invalid per se by reason of non-compliance with statutory or other formalities, and secondly, some change of circumstances supervening on, or arising from, the purported surrender which, by reason of the doctrine of estoppel or part performance, makes it inequitable and fraudulent for any of the parties to rely upon the invalidity of the purported surrender". The fact that the doctrine of estoppel really forms the foundation in such a case as this of the alleged surrender by operation of law is, I think, clear from the judgment of Chitty J. in *Wallis* v. *Hands* (20).

The question in the present case is whether, on the facts as found by the county court judge (leaving aside for the moment any question of the Rent Acts), there are circumstances supervening to prevent the tenant from denying that the old relationship has been superseded by the new. If there is a new arrangement which the tenant is asserting by his conduct, then he is estopped from denying that the landlord was capable of entering into that new arrangement; and, if the new arrangement could not be entered into while the old agreement subsisted, it follows that the tenant is equally prevented from denying that the old agreement has gone.

There was some argument in regard to the proper conclusion, as a matter of law, to be drawn from the transaction. It is divided into more than one section. First of all it was said that in May, 1946, the existing tenancy ceased. Then comes the second question: what took its place? The answer is: the arrangement that the landlord would charge him no more rent and that he would live in the cottage for the rest of his days rent free. My own conclusion from that statement of the facts is that the old tenancy was extinguished by the creation in its place of a licence for the tenant to occupy the cottage without any payment of rent for the rest of his days.

---

(19) 13 M. & W. 285.

(20) [1893] 2 Ch. 75.

Since the recent decision in *Winter Garden Theatre (London), Ld.* v. *Millennium Productions, Ld.* (21) I think that, although a licence of that kind may, apart from the terms of the contract, be revoked, it may now be taken that if the landlord, having made that arrangement, sought to revoke it, he would be restrained by the court from doing so. Thus the result is arrived at that the tenant was entitled as licensee to occupy the premises without charge for the rest of his days, and he did so. I prefer that analysis of the case.

An alternative would be to say that he became tenant at will, with a promise that the tenancy at will would not be determined. If such a tenancy was created, it is said, it required a written instrument; but, if it did, the acts following the transaction here might supply part performance sufficient to make it equivalent to a written agreement. But it is unnecessary to express a final view about it because I think that there was a licence here; and that follows the view favoured by the judge. Having regard to what occurred afterwards (apart always from the Rent Acts), there is in my judgment no good ground for supposing that the arrangement come to would not have the effect necessarily of producing a surrender by operation of law of the pre-existing tenancy.

I think that some of the cases cited provide examples which strongly support that view. One of these is *Metcalfe* v. *Boyce* (22), where in the case of a police constable, formerly a tenant, an arrangement which was apparently parol only and did not disturb the continued occupation by the constable produced the result that the constable ceased to be a tenant and became a licensee. In *Oastler* v. *Henderson* (23) it was pointed out by Brett L.J., in a passage referred to by the county court judge, that a mere agreement to effect some new transaction will not of itself suffice to produce surrender by operation of law. Nothing that I have said in any way impinges on the validity of that observation. It is not a question of mere agreement here; there were here an agreement and superadded acts in pursuance of the agreement sufficient to show that effect in the fullest sense was given to the agreement, the new agreement being inconsistent with the continuation of the old tenancy. I therefore consider that, unless the matter is affected otherwise by the Rent Restriction Acts, there is no good ground for saying that this case on the facts as found would not suffice to produce a surrender by operation of law.

---

(21) [1948] A. C. 173.

(22) [1927] 1 K. B. 758.

(23) 2 Q. B. D. 575, 579.

It remains to consider the Rent Restriction Acts. Any judge who has before him a case of this character must consider carefully that if an ordinary tenancy, uncontrolled by the Acts, is determined by notice to quit or by any other means, but the tenant remains in possession, either he is a trespasser or he must be treated as staying on with the assent of the landlord and therefore by reference to some new arrangement. In cases to which the Acts apply the position is not quite the same. In such a case the mere determination of a contractual tenancy does not of itself make the tenant who stays on a trespasser; for, without the existence of some new supervening arrangement he might, and prima facie would, remain on as a tenant by virtue of his statutory right so to do under the Acts. In considering this matter the judge must bear in mind the proper inference to be drawn from the fact that he is concerned with a rent-controlled house. I will not pursue that further for, as I have already said, there is no suggestion here that the tenant was a statutory tenant at the date of his death.

Mr. Hoare has boldly asserted that where you have a rent-controlled house and a rent-controlled tenancy there is really no means at all by which the parties can get themselves out of that situation. The strongest case which was put was that of a lease under seal, say for seven years, at a rent bringing the tenancy within the Acts. Two years before its termination the parties enter into a new deed in which surrender of the first lease is recited and a new demise is made to the tenant for ninety-nine years, determinable on the tenant's earlier death, at a peppercorn rent. Mr. Hoare says, and I think he was forced to say, that this is quite ineffective, and that ten years afterwards, when the tenant dies, his representative is entitled to hold over under the original lease. I find it very difficult to suppose that such a transaction is prohibited and rendered wholly ineffective and futile by the Rent Restriction Acts.

That, however, is not this case. Another instance of the sort of transaction which might occur was put by my brother Singleton early in the argument. A landlord may say to a tenant: "You "are getting on in years. I am grateful to you for all you have "done and I am quite willing to have the present tenancy put "an end to and to allow you to remain on as my licensee for the "rest of your life without paying rent. That will give me the "advantage, if I survive you, that after your death I shall be "able to get vacant possession; but I shall not be able to disturb "your occupancy during your life. Alternatively, you can stay "on as you are. I may try to get rid of you if I can provide "alternative accommodation. But otherwise the right that you "will enjoy will persist in favour of your daughter or whoever "else may under the Act be entitled to it after your death.

"Which do you prefer?" Suppose that the tenant says that he prefers the former of the two offers which will enable him to spend his life in the house without paying any more rent: if that were given effect to by a carefully drawn agreement, it is very difficult to suppose that the court would feel bound to disregard it.

Such a view would appear to be inconsistent with the conclusion of this court in *Turner* v. *Watts* (24), where the bargain was that the tenant should buy the premises and the contract provided that the existing tenancy should cease, the tenant thereafter to be a tenant at will paying interest on the unpaid purchase money. The proposed sale went off altogether, but it was held that by the transaction, which was entered into in good faith, the tenancy had gone and with it protection under the Acts. Singleton L.J.'s example, if effected by a carefully drawn document, could not, in my view, be distinguished in principle from *Turner* v. *Watts* (24). I am content to accept these words in Megarry on the Rent Acts (5th ed.), p. 10: "There is nothing "to prevent the parties from so arranging matters that there is "nothing to which the Act can apply, provided the transaction "in question is a genuine transaction and not a mere sham." The mere fact that there is not a written document, a document under seal, cannot, as it seems to me, affect the essential validity of the transaction. The difference in the two types of case is a matter of evidence rather than substance. If here the facts which the judge has found are the equivalent of what could be stated in a written document, why should there be any distinction?

I confess that I am by no means sure that if I had been trying the case I would have reached quite the same conclusion as did the judge. That does not mean that I would have impugned the good faith of the plaintiff; but I am not sure that I would have found the transaction proved. Nothing is said about any other terms of the arrangement or about the terms of the original tenancy. I might therefore not have found the facts as the judge found them. But I might well have been wrong. I am very anxious to avoid any suggestion that a decision in the plaintiff landlord's favour would open the door to devices whereby a landlord could go to a sick tenant and get him to agree to some arrangement which was really to the advantage of the landlord and the grave disadvantage of the tenant. I think that the county courts may be relied upon to protect tenants from that kind of thing. But this is a county court appeal, and it is impossible to say that there is no evidence on which the county court judge could find that this was an effective genuine transaction. As he has so found, I can find no ground on principle why the result which the parties intended should not ensue. In my view

(24) 44 T. L. R. 336.

C. A.
1950
FOSTER
v.
ROBINSON.
Evershed M.R.

there was, as a result of the agreement come to, a delivery up of possession under the former tenancy and a resuming of possession under a new transaction immediately afterwards. To use the language of Cockburn C.J. in *Oastler* v. *Henderson* (25), there must be "something amounting to a virtual taking of possession." If the key had been handed over and then been handed back the next minute that would have symbolized the delivery up of possession, and I cannot think that it vitally matters that that performance was not gone through. There was in this case a surrender by operation of law. I think that the judge has so found, and, there being evidence to support that finding, I do not think that we would be justified in differing from his conclusion of fact. If we are not, it seems to me that the conclusions which I have stated necessarily follow.

I have not referred to many of the cases cited in argument, but I have borne them in mind. The whole question, as the judge says, is: "was the old contractual tenancy determined? "Was it determined as the result of surrender by operation of "law?" I think that this appeal should be dismissed.

COHEN L.J. I agree with the conclusion reached by my Lord and with his reasons, and I only make a comment on one point. Mr. Hoare invited us to say that the principles to be applied in determining whether or not there had been a surrender by operation of law where the premises were such as if let would come within the control of the Rent Restriction Acts are different from those which would be applied in other cases. Mr. Widgery denied that there is any distinction at all. I think that Mr. Widgery is right. It seems to me that in determining whether or not there is a contractual tenancy in existence or whether there has been a surrender by operation of law the same principles must be applied to premises which are within the Acts as to those which are not. That is not to say that the fact that the premises are within the control imposed by the Acts is immaterial. It is, I think, a very material factor for the county court judge to take into account in investigating the transaction alleged to have given rise to the surrender by operation of law and in deciding whether it was a genuine transaction in exact accordance with that which it purported to be or was, as was said in the passage in Megarry on the Rent Acts (5th ed.), p. 10, to which my Lord referred, a mere sham.

But if the county court judge comes to the conclusion that the transaction was a genuine one and that the result of that genuine transaction was to effect a surrender by operation of law, I see no reason, and I know of no provision in the Rent Restriction

---

(25) 2 Q. B. D. 575, 578.

Acts, which prevents his giving effect to that conclusion. In the present case the county court judge has carefully considered the value to be attached to the evidence of the plaintiff landlord, having regard to the fact that the tenant was dead, and he has given careful consideration to the question what was the intention of the parties and the effect of the transaction. He has found that it was a genuine transaction, and, on his finding, it seems to me that the inevitable consequence is that there was a surrender by operation of law, and therefore that there was at the material time no contractual tenancy in existence which could in any circumstances have entitled the defendant in this action to protection under the Rent Restriction Acts. For these reasons, I agree that the appeal should be dismissed.

SINGLETON L.J. I am of the same opinion. I look upon the matter in this way: (1.) the defendant as administratrix of her father's estate has only the rights which her father had as occupier; (2.) the county court judge has found that from May, 1946, until his death the father was a licensee, paying no rent, but entitled to remain in the cottage for the rest of his life; (3.) this is not a case of contracting out. If this correctly states the position, we are not concerned with the Rent Restriction Acts, for s. 3 of the Act of 1933 only limits the power of the court in the case of a house to which the principal Acts apply. They do not apply to one which is the subject-matter of a licence: they apply only to a house or a part of a house let as a separate dwelling at a rent within the purview of the Acts: see s. 12, sub-s. 2, of the Act of 1920.

If the county court judge was right, the house was not let after May, 1946. The real substance of the matter lies in this: that the tenancy which had existed for some years should cease and that the tenant should remain in the house for the rest of his days, the landlord charging him no rent. That arrangement is the crucial point in the case. The county court judge came to the conclusion that that was a licence and no more.

Speaking for myself, if on seeing the plaintiff landlord I had formed the impression of him which the judge formed I should have had no doubt as to the arrangement made, for support is to be found for it in two or three respects. First, there is the fact that thereafter for the remaining three and a half years of the former tenant's life no rent was proffered or demanded. After the death of the former tenant the plaintiff landlord wrote to the defendant: "Dear Maud, No doubt Harry would tell you "what I'm doing re your cottage and Wilkinsons—I have decided "to sell them both some time in March, and you can stay on "rent free as before until April 6, as I shall sell your cottage "with vacant possession on April 6, 1950. Spilman & Glasier, "auctioneers, are acting for me. Hoping you are keeping well. "Yours sincerely, W. H. Foster." That letter telling the defendant what he proposed to do shows, I think, that there was an arrangement of the kind to which the plaintiff spoke. The defendant herself in the course of her evidence was asked questions. She said: "I only know of arrangement by what "father told me." If the evidence of the plaintiff himself was accepted by the judge, he was well justified in finding the arrangement that he did find.

It was urged on us that to uphold this judgment would be to open wide a door enabling people to defeat or to get round the provisions of the Rent Restriction Acts. I do not take that view. I regard this as a case in which the landlord acted perfectly properly and in the interests of the occupier. Not a word can be said against him. Although county court judges who have these matters before them obviously must be careful before they find an agreement of this kind, I do not think that this court ought to hesitate to uphold this judgment in favour of a landlord who was acting, as I think, in the best interests of the occupier of the house. It is for the county court judge to find the facts, and he has done that in a careful judgment. He came to the conclusion that from May, 1946, the occupier was not a tenant at all. I agree with that finding. The position of the defendant's father was altered by agreement between the parties; there was a complete change: the father became a licensee, and could not have been heard to say that he was anything more than that. He had had the advantage of the agreement and had paid no rent for three and a half years. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co., for W. Bains, Brigg; Waterhouse & Co., for Sowter & Gibson, Brigg.*

H. C. G.

C. A.

1950
May 3, 5, 8, 9, 10, 11, 12, 15, 16; *June* 15.

Bucknill, Cohen and Denning L.JJ.

BOGUSLAWSKI AND ANOTHER *v.* GDYNIA-AMERYKA LINIE

[1946 B. 273]

International law—Polish Government in London from 1940 *to* 1945 *—New Polish Government constituted at Lublin on June* 28, 1945*—Recognition of new Polish Government by British Government as from midnight July* 5–6, 1945*—Terms of certificate of recognition —Retroactivity—No de facto control over Polish ships and men in England by new Polish Government.*

By a certificate of recognition signed by the British Foreign Secretary, His Majesty's Government in the United Kingdom recognized the Polish Government having its headquarters in London as being the Government of Poland up to and including midnight of July 5–6, 1945, and as from that point of time recognized the Polish Provisional Government of National Unity as being the Government of Poland, and ceased to recognize the Polish Government in London; but the Foreign Secretary stated in the certificate that the question of retroactive effect of recognition of a government was a question of law for decision by the courts.

On this question of the retroactive effect of the recognition by the British Government of the new Polish Government, and so, of the validity of the acts of the London Polish Government from June 28, 1945, when the new Polish Government was formed, until midnight on July 5–6, 1945,

Held, that the principle that there could not be more than one government of a foreign State recognized by the British Government at the same time, truly stated, was that there could not be recognition of more than one such government at the same time in respect of the same territory. Comity seemed to be satisfied by a recognition of the validity of the acts done by the new Polish Government during the period from June 28, 1945, to midnight on July 5–6, 1945, only in territory under its de facto control, and convenience required that the validity of acts done in England by the old Polish Government during that period should not be questioned. Neither the withdrawal of recognition of the old Polish Government nor the recognition of the new Polish Government by the British Government could have any retroactive effect from July 5–6, to June 28, 1945, the date when the new Polish Government was formed, except with regard to persons and property over which the new Polish Government exercised effective control.

Per Cohen L.J. On this question the view which he had expressed was obiter since it was unnecessary, owing to the express terms of the certificate of the British Foreign Secretary, to consider what the position would be if the recognition by His Majesty's Government of the new Polish Government were to have some retroactive effect: the certificate itself was conclusive.

Per Denning L.J. The certificate of the British Foreign Secretary was not conclusive, because the certificate expressly and correctly stated that the retroactive effect of recognition was a question of law for the courts.

Per Bucknill L.J. On either view, the acts of the old Polish Government in England from June 28 to midnight July 5–6, were valid and binding, at any rate unless and until the new Polish Government rescinded or repudiated them.

Accordingly when an offer was made before midnight on July 5, 1945, by the Minister of Industry, Commerce and Shipping in the Polish Government in London, acting on behalf of the Polish shipping companies, to Polish officers and seamen serving on Polish ships outside the territory of Poland and not under the de facto control of the new Polish Government, that any officer or man who left his ship in consequence of the political situation should receive suitable compensation, which, it was agreed, was three months' wages, to be paid by the company owning the ship on which the officer or man was serving,

Held, (a number of defences based on Polish law having been negatived) that the offer, provided that it were not ultra vires or made in bad faith, was valid, and, further, that it could be accepted by such officer or man after midnight on July 5–6, unless the offer had meanwhile been revoked by the new Polish Government.

Banco de Bilbao v. *Sancha* [1938] 2 K. B. 176 and *Guaranty Trust Co.* v. *United States* (1938) 304 U. S. 126, discussed.

Decision of Finnemore J. [1950] 1 K. B. 157, affirmed.

APPEAL from Finnemore J. (1).

The facts, substantially as stated by Cohen L.J., in his judgment, were as follows: The plaintiff Boguslawski was an officer in the Polish merchant navy. At the material times he was serving on the *S.S. Morska Wola*, owned by the defendants, as second engineer. He was a member of the Polish Captains' and Officers' Union (hereinafter referred to as "The Officers' Union"). One Dabkowski was at the material times chairman and acting secretary of that union in London. The second plaintiff, Krupka, was a seaman in the Polish merchant navy and claimed to have been serving at all material times in the same ship as his co-plaintiff. He was a member of the Polish Seamen's Union (hereinafter referred to as "The Seamen's Union") of which one Fligiel was at all material times the chairman. The defendants, Gdynia-Ameryka Linie, were a Polish limited company, 98½ per cent. of the share capital of which was owned by the Polish State. The defendants were at all material times managing the ships of two other Polish companies. One Plinius was a member of the board of management of the defendants, and was on September 2, 1942, appointed a curator of the defendants under Polish war-time legislation. The old Polish Government was the Government of the Polish State which, after Poland had been overrun by

---

(1) [1950] 1 K. B. 157.

Germany, left Warsaw and established itself first at Angers and then, in 1940, in London. One Kwapinski ("the Minister") was the Minister of Industry, Commerce and Shipping in the old Polish Government. The new Polish Government was the Polish Provisional Government of National Unity which on June 29, 1945, wrote to His Majesty's Government claiming that it had been established on June 28, 1945, pursuant to the decision of the Crimea conference and asking for recognition by His Majesty's Government.

The material events occurred during a very short period. On June 25, 1945, the Council of Ministers of the old Polish Government passed a resolution to determine the employment of civil servants and to pay them on that determination a gratuity of not less than three months' salary. On the same date the council resolved that employees of Polish shipping enterprises should be paid a gratuity on an equal footing with State employees, with the proviso that the gratuity was to be paid out of the moneys of the enterprises concerned. On June 28, 1945, on which date the new Polish Government claimed to have been established, the President of the old Polish Government made a decree giving statutory effect to the resolution as regards civil servants. The resolution as regards employees of shipping enterprises was inserted in part 2 of that decree, but it was not contended that this inclusion had any statutory effect or of itself gave any legal right to the plaintiffs in this action.

Before that decree had been published the Minister had on June 26, 1945, sent for Plinius and told him of the resolution passed by the Council of Ministers as regards shipping enterprises, but Plinius said that it could not be in the interests of the defendants to immobilize their ships, and that he must refuse to implement the resolution so far as officers and seamen were concerned. His attitude was confirmed at a meeting held on June 27, at which were present Plinius and the curators of the other two shipping lines which were being managed by the defendants. At this meeting it was decided to adopt the Minister's suggestion as regards employees ashore, but not as regards officers and crews of ships.

On July 2, 1945, letters were written by the Officers' Union and the Seamen's Union to the Minister and to the Association which represented all the Polish shipping lines asking for pay for a number of things including three months' compensation for their members in the event of the taking over of the Polish merchant navy by the new Polish Government in the same way as was being done regarding employees ashore. On July 3, 1945, the Minister had an interview with representatives of both Unions. Fligiel and a colleague represented the Seamen's Union.

The trial judge stated what happened at this interview as

C. A.

1950

Boguslawski and Another v. Gdynia-Ameryka Linie.

follows (2): "Mr. Kwapinski said that he would agree that out "of the moneys of the defendant company or the other shipping "companies the sailors who in fact left their ships, because of this "change of government, should be treated in the same, or sub-"stantially the same way, and should be entitled to the three "months' gratuity which was being given to the other people. "Mr. Kwapinski told the trade union representatives that the "government was paying three months' gratuity to civil servants, "that the shipping lines were going to do the same to their office "staffs, and that he was proposing that seamen should be treated "in the same way." He then, in their presence, dictated a telegram to be sent to the head of his shipping department. The effect of that telegram as summarized by the trial judge was: "That "telegram . . . referred to what was happening about the political "situation, and said that the ministers had decided to discharge "all officials of the government and pay them compensation, and "then it said: 'At the same time, on the authority of the govern-"'ment, I made a declaration to the Minister of War Transport "'on behalf of the Polish crews requesting that no ships of the "'Polish merchant navy be directed to waters under the Soviet "'control.' That was another point they were anxious about. "Then it said: 'The trade organizations of officers and seamen "'are of the view that until free, unfettered and democratic "'elections are held they are unable to return to homeland as "'well as to take ships to waters controlled by the Soviet Union. "'I also asked that in this case all Polish ships be first directed "'to the United Kingdom ports so as to give the officers and "'seamen the possibility to disembark in ports considered as "'home ports.' Then comes the part that we are considering in "this case: 'I also declared that in the event of their leaving the "'ships owing to the above-mentioned causes, the captain, "'officers and seamen are entitled to compensation on equal "'footing with government officials and shipping companies "'staff. . . .' Then the final thing is 'Captains of the ships "'are requested to bring the above to the notice of the crews.'"

It is on what transpired at this interview that the plaintiffs rely as constituting the agreement on which they primarily sue. On the same day Plinius had an interview with the Minister at the latter's request. Plinius said that the Minister told him that the board of management of the defendants must reverse the decision which they had taken on June 27, 1945, not to offer compensation to officers and seamen who might leave their ships by reason of the impending change of government. Plinius refused and left the Minister. Another interview, however, took place on July 4, at which Plinius was shown a telegram which was, so far as material, in the same terms as that which had been dictated by the Minister at his interview with the union officials. Plinius at first refused to send it, but ultimately, on its being pointed out to him that it was being sent by the Minister, and that he was merely being used as a post office as the Minister did not know the location of Polish ships, he agreed to send it, and did so on July 5, 1945.

---

(2) [1950] 1 K. B. 169, 170.

In its final form as dispatched to the master of *S.S. Morska Wola* it read as follows: "Priority. Captain, *Morska Wola* c/o "Lamports, Manchester. For Miezkowski. In connexion with "the political situation now prevailing and in view of the "announcement of Anglo-Saxon Governments on possibility of "withdrawing recognition from the Polish Government the "Council of Ministers at meeting on June 25, decided to discharge all officials of the government administration and to pay "those discharged compensation on the day of publication of the "decree. At same time, on authority of the government, I "made a declaration to Minister of War Transport on behalf of "Polish crews requesting that no ships of Polish merchant navy "be directed to waters under the Soviet control. I have done so "as a consequence of claims put forward by the interested "organizations. The trade organizations of officers and seamen "are of the view that until free unfettered and democratic "elections are held they are unable to return to homeland or take "ships to waters controlled by the Soviet Union. I also asked "that in this case all Polish ships be first directed to United "Kingdom ports, so as to give officers and seamen the possibility "to disembark in ports considered as home ports. I also "declared that in event of their leaving ships owing to above-mentioned causes, captains, officers and seamen should be "entitled to receive suitable compensation. Captains of ships "are requested to bring the above to notice of crews. Jan "Kwapinski, Minister."

It was common ground between the parties that "suitable" in that telegram meant "three months'", and the plaintiff Krupka deposed that the captain of the ship told them so. The telegram was received by the chief officer of the *S.S. Morska Wola* on the same day and was in due course read to the officers and crew. The plaintiff Boguslawski who had been serving on the ship since before July 5, heard it on July 5, but it only reached the plaintiff Krupka (who joined the ship on July 4) on July 6. He left the ship on July 7 and the plaintiff Boguslawski on July 11.

The Minister wrote a letter to Plinius and to the curators of the other two Lines managed by the defendants purporting to act under powers conferred by the legislation which provided for the appointment of curators and pursuant to the resolution of the

Council of Ministers passed on June 25, 1945. By it he directed the curators to pay gratuities to officers and seamen who left their ships on the same scale as that paid to the shore employees of the respective companies. That letter bore date July 5, 1945, but did not reach any of the curators before July 7, and did not reach Plinius until July 10. It was therefore improbable that the letter was dispatched before July 6.

In the meantime as at midnight on July 5–6, His Majesty's Government had recognized the new Polish Government. The certificate of the Secretary of State for Foreign Affairs signed by him was in the following terms: "1. Up to and including mid-"night of July 5–6, 1945, His Majesty's Government in the "United Kingdom recognized the Polish Government having its "headquarters in London as being the Government of Poland, "and as from midnight of July 5–6, 1945, His Majesty's "Government in the United Kingdom recognized the Polish "Provisional Government of National Unity as the Government "of Poland, and as from that date ceased to recognize the former "Polish Government having its headquarters in London as being "the Government of Poland. 2. On June 29, 1949, the following "message to the Prime Minister from the head of the said Polish "Provisional Government of National Unity was handed by the "Polish Ambassador in Moscow to His Majesty's Ambassador in "Moscow: 'I have the honour to notify you that . . . the "'Provisional Government of National Unity was formed this "'28th of June according to art. 45 of the Constitution of the "'Polish Republic, 1921. . . .' 3. I am advised that the question "of the retroactive effect of recognition of a government is a "question of law for decision by the courts."

The plaintiffs brought the present action on February 8, 1946. By their statement of claim they based their right to relief on an agreement alleged to have been made at the interview on July 3, 1945, between the Minister acting on behalf of all Polish shipping companies on the one side, and the representatives of the two unions acting on behalf of all their members on the other, whereby it was provided that in the event of those members leaving their ships they should be entitled to receive compensation on an equal footing with all government employees of the State and the staff of Polish shipping companies. They alleged in the alternative that the plaintiffs by leaving their ships on the faith of the telegram signed by the Minister (dispatched by Plinius and communicated to them by their captain) had accepted the offer contained in that telegram which offer the plaintiffs said had been made by the Minister on behalf of the defendants. They made other alternative allegations including an allegation that the defendants by the Minister had contracted a unilateral obligation to the plaintiffs which was binding on the defendants after communication to the plaintiffs without the necessity for any acceptance. The plaintiff Boguslawski claimed 176*l.* 5*s.* and the plaintiff Krupka 123*l.* on the basis of three months' wages from July 5, 1945. The defendants denied liability under Polish law, alleged that the representatives of the union had no authority to make the oral agreement set up by the plaintiffs, and pleaded, in the further alternative, that the transaction alleged was a contract of donation and invalid for want of notarial act. They further alleged that the effect of the recognition of the new Polish Government by His Majesty's Government at midnight on July 5–6 was retroactively to make the old Polish Government incompetent after June 28, to carry out any legislative administrative or other function on behalf of the Polish State.

Finnemore J., found for the plaintiffs. He rejected the argument based on the effect in English law of the recognition of the new Polish Government, on the ground that the new Polish Government had not before midnight on July 5–6 any control over Polish ships and Polish seamen, because they were all far removed from the area over which the new Polish Government was at that time exercising de facto control. He also relied on the fact that the certificate of the Secretary of State specified the exact hour at which recognition was accorded to the new Polish Government and impliedly withdrawn from the old Polish Government and said (3): "I should have thought, and I so hold—there being "no authority on this that I know at all—that where the government of this country in terms certifies that it recognizes one "government up to midnight on July 5–6 and another government "thereafter, the acts done by that government recognized up to "midnight in this country, while it was still recognized as the "government, must be valid. Otherwise this certificate would "seem to mean little or nothing. And, I think, if that is so, "there can be no retroactive effect back, for example, to June 28, "as is pleaded in this case." That difficulty being out of the way the judge held that the plaintiffs were entitled to succeed.

He summarized the objections taken by the defendants to the plaintiffs' claims as follows (4): (1) that the Minister had no power to make this contract at all; (2) that, if he did make it, it was a collective agreement and under Polish law should have been in writing; (3) that the trade union officials had no right or authority to enter into whatever it was they did enter into on behalf of their members; (4) that, if it was merely a unilateral obligation, it was unenforceable as against the company; (5) that, if it were argued that the men ratified the action of the trade union officials by leaving their ships, they had no power to ratify such an arrangement; and (6) that at the most this arrangement of July 3, was what in Polish law was called a "donation", and that a donation must be in a special form, called "notarial form", and that plainly that arrangement was not in that proper form.

---

(3) [1950] 1 K. B. 174.

(4) [1950] 1 K. B. 171, 172.

He found in the plaintiffs' favour that (1) the Minister had power under cl. 19 of an Act passed on March 30, 1939, to make on behalf of the defendants the contract alleged; (2) it was not a collective agreement within art. 445 of the Polish Code of Obligations, because something given to workmen on one occasion only could not be a collective agreement, at any rate where it did not affect future entrants into the trade or profession; (3) the union officials had power to make the alleged agreement on behalf of the plaintiffs, or, at any rate, if they had no such authority, they purported to do so, and the plaintiffs by leaving their ship ratified the contract; (4) and (5) quite apart from the question of contract the Minister had entered into a unilateral obligation on behalf of the defendants to pay the compensation claimed, and that obligation, being communicated to or accepted or ratified by the union representatives, or, alternatively, the plaintiffs, became a bilateral enforceable obligation; and (6) if the contract relied on would otherwise have been a contract of donation within art. 354 of the Code of Obligations and therefore valid only if made in notarial form, it was taken out of that article because it was made under a moral duty and, therefore, within art. 355 (3).

From that decision the defendants appealed basing their appeal on the same points as they took in the court below. Two further points emerged before the Court of Appeal: The first was that interest not being claimed as a matter of contract, the right to it was governed by the law governing procedure (in this case English law) and, accordingly, that interest should only have been allowed at the rate of 4 per cent. This point was conceded by the plaintiffs. The second was that having regard to the evidence of Dr. Bloch, the expert witness for the plaintiffs, the plaintiff Krupka, having only joined his ship on July 4, was not within the ambit of the contract alleged to have been made on July 3. This also was conceded, but the plaintiff Krupka's rights based on the telegram dispatched on July 5 were maintained and in the result were upheld by the court.

Pritt K.C., *Scott Henderson K.C.*, and *A. J. Hodgson* for the defendants. There is only one issue of English law: whether, once a foreign government has been recognized by the British Government, the acts of that foreign government are validated retroactively to the date of the formation of that government. The government recognized was that of the State of Poland, and there cannot be more than one government of a foreign State recognized by the British Government at the same time.

In this case the recognition was of the Polish Provisional Government of National Unity as from midnight of July 5–6, 1945. That government was formed on June 28, 1945, and retroactively the acts of that government were validated as from that date. The acts, therefore, of any other government during that period were invalid and, on that ground, the plaintiffs' action here should have been dismissed.

The certificate of the British Foreign Secretary is correct in pointing out in paragraph 3 that he was advised that the question of the retroactive effect of recognition of a government is a question of law for the courts. That question and its answer are as above formulated: see Oppenheim's International Law (7th ed.), ss. 73 to 77, at pp. 125–148.

In *Lazard Brothers & Co.* v. *Midland Bank Ld.* (5), Lord Wright said that the British Government had accorded recognition to the Soviet State de facto in 1921, and de jure in 1924. He said (6): "The effect of such recognition is retroactive and dates "back to the original establishment of Soviet rule which was in "the 1917 October Revolution, as was held by the Court of Appeal "in *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & "Co.* (7)." See also the judgment of Bankes L.J. in *Luther's* case (7) citing three authorities decided in the Supreme Court of the United States (8), and also that of Warrington L.J. (9), who there said, "I should have thought that in principle recognition "would be retroactive at any rate to such date as our government "accept as that by which the government in question in fact estab-"lished its authority"; and again (10): "In my opinion there is no "difference for the present purpose between a government recog-"nized as such de jure and one recognized de facto. In the latter "case, as well as in the former, the government in question acquires "the right to be treated by the recognizing State as an indepen-"dent sovereign State, and none the less that our government "does not pretend to express any opinion on the legality or other-"wise of the means by which its power has been obtained." See also the judgment of Scrutton L.J. (11).

The decision in *Banco de Bilbao* v. *Sancha* (12) lends support to the defendants' contention: see the judgment of Clauson L.J. (13). In *Haile Selassie* v. *Cable and Wireless* (*No.* 2) (14), it appeared that His Majesty's Government recognized the King of Italy as de jure Emperor of Ethiopia, and it was admitted that

(5) [1933] A. C. 289.
(6) Ibid. 297.
(7) [1921] 3 K. B. 532.
(8) Ibid. 541–2.
(9) Ibid. 549.
(10) Ibid. 551.
(11) [1921] 3 K. B. 554–6.
(12) [1938] 2 K. B. 176.
(13) Ibid. 195–6.
(14) [1939] Ch. 182.

this recognition acted retrospectively. [Counsel also referred to Lord Atkin's judgment in *The Arantzazu Mendi* (15).]

Though it may be said that there is no reported case which decides precisely the proposition for which the defendants contend, that contention follows in logic from the observations of the judges in the cases above cited. [COHEN L.J. If during the period from June 28 to July 5–6 midnight, an Englishman paid in England a debt due to the Polish State to the proper officer of the London Polish Government and obtained from him a proper discharge, would not an action against the Englishman in the English courts at the instance of the new Polish Government for the debt fail?] That might be so, but that case is not analogous to the present, since (*a*) the plaintiffs here are Polish nationals serving on Polish ships, that is, on Polish territory, and (*b*) the transaction in question was not completed. The issue is whether an executory contract or, on another view, an offer not accepted by midnight July 5–6, remained in force after the recognition by the British Government of the new Polish Government. In *Guaranty Trust Co.* v. *United States* (16), on which the plaintiffs rely, the court was concerned with a completed transaction.

The trial judge was in error in awarding eight per cent. on the amounts recovered by the plaintiffs. The amount of that interest must be determined by the lex fori, and the amount is four per cent.

[Counsel's argument was then directed to questions of Polish law.]

Linton Thorp K.C., and *Niall MacDermot* for the plaintiffs. The extent of the recognition of the old and new Polish Governments is settled finally and with precision by the certificate of the Foreign Secretary. "Up to and including midnight of July "5–6, 1945, His Majesty's Government in the United Kingdom "recognized the Polish Government having its headquarters in "London as being the Government of Poland" and "from that "date ceased to recognize the former Polish Government having "its headquarters in London as being the Government of Poland." There can therefore be no question of retroactive effect of the recognition of the new Polish Government. The acts of the old Polish Government before midnight on July 5–6, are valid and binding on the new Polish Government, at any rate until the new Polish Government has revoked them.

But if the doctrine of retroactivity is relevant, that doctrine is limited to the validation of acts done by a new government in an area in which it was in de facto control during the time when it was still unrecognized: it does not operate to grant retrospective de jure recognition to the new government for all purposes. There is no case where the doctrine has operated to invalidate an act by a government in respect of matters and in an area over which it had effective control at the time of the act. *Banco de Bilbao* v. *Sancha* (17) was a case where a legislative act by a de jure government purporting to legislate for an area over which another government had de facto control was held invalid. In the present case the old government had effective governmental control de jure and de facto over Polish citizens and Polish property in the United Kingdom at the time of the contract, and the new government had none until after midnight July 5–6, 1945. If the defendants are right, the doctrine of retroactivity must be a legal fiction; but the doctrine is not a legal fiction: it is a belated recognition of pre-existent facts by the courts which, owing to the lack of diplomatic recognition, they were not previously able to take into account.

---

(15) [1939] A. C. 256, 264–5.

(16) (1938) 304 U. S. 126.

Guaranty Trust Co. v. *United States* (18) is an authority for the proposition that retroactivity will not operate to invalidate acts by a duly recognized government. There is no basis in principle for drawing a distinction between acts which confer rights on the nationals of the recognizing country and acts which confer rights on other nationals. Nor is there any reason to distinguish between acts which confer rights in futuro, e.g., executory contracts and acts which are completed, e.g., executed contracts. The only question is whether the act, whatever its nature, was at the time a valid act.

If it is necessary under Polish law for the plaintiffs to rely on an offer made by the Minister on behalf of the defendants before the date of transfer of recognition and on acceptance by the plaintiffs after that date, there is no principle or authority in international law to make the offer lapse at the time of the transfer of recognition. The position is the same as if there had been an ordinary change of Minister or change of government between the making of the offer and its acceptance. The offer is that of the defendants and not of the Minister, and the defendants could have revoked the offer after the transfer of recognition, but did not do so.

[Counsel's argument was then directed to points of Polish law.]

Pritt K.C. replied.

Cur. adv. vult.

June 15. Cohen L.J., reading his judgment first, at Bucknill L.J.'s request, stated the facts substantially as above set out, and continued: Mr. Pritt put in the forefront of his argument the point that in English law recognition by His Majesty's Government of a foreign government de jure or de facto, has retroactive effect. Before I consider the validity of this point I must premise that, although, as the certificate itself points out, in para. 3, the question whether and to what extent recognition of a foreign government is retroactive is a matter of law for decision by this court, the facts as to the extent of recognition of the old and the new governments are decisively settled by the certificate of the Secretary of State. Paragraph 1 is the material part of that certificate for this purpose. It seems to me, as it did to the judge, that where the Secretary of State certifies that His Majesty's Government recognizes one government up to midnight on a specified day and another government thereafter, the position is the same as if a Secretary of State were to certify, for example, that His Majesty's Government recognized the government of one absolute monarch up to the moment of his death and the government of his son and heir thereafter. There would then be no question of retroactive effect: one government would be and could be recognized as the successor of the other. So here it seems to me that the Secretary of State is in effect saying that the new Polish Government is recognized as from midnight on July 5–6, as the legitimate successor of the old Polish Government. In these circumstances, it seems to me that the acts of the old Polish Government prior to midnight on July 5–6, are valid and binding on the new Polish Government at any rate unless and until the new Polish Government rescinds or repudiates them, an event which it is common ground between the parties has not occurred so far as any act relevant to the present case is concerned.

---

(17) [1938] 2 K. B. 176.

(18) (1938) 304 U. S. 126.

As I have reached this conclusion, it is not strictly necessary for me to consider what the position would be if the recognition by His Majesty's Government of the new Polish Government were to have some retroactive effect. But, as the matter was fully argued, I ought to say that, even on this basis I would doubt whether Mr. Pritt was entitled to succeed. He argued that recognition not only validated all acts of the new Polish Government done during what he conveniently called the twilight period (that is, the period between the date on which that government attained power and the date of recognition by His Majesty's Government) but also invalidated all acts, whether executive or legislative, done during the twilight period by the old Polish Government. He admitted that there was no reported case that went this length, but he said that the principle laid down by this court in *Aksionairnoye Obschestvo A. M. Luther* v.

James Sagor & Co. (19), and approved by the House of Lords in *Lazard Bros. & Co.* v. *Midland Bank, Ltd.* (20), was sufficiently far-reaching to entitle him to succeed.

That principle is concisely stated by Lord Wright in the latter case. The question at issue was whether or not the Industrial Bank, a Russian company, was an existing company or had been duly dissolved under Russian law. Lord Wright said (21): "The "Industrial Bank was a corporation established by an Act of the "Tsar; but the governing authority in Russia, as recognized in "the English Courts, is now and has been since October, 1917, "the Soviet State. Soviet law is accordingly the governing law "from the same date in virtue of the recognition de facto in "1921 and de jure in 1924 by this country of the Soviet State "as the sovereign power in Russia. The effect of such recogni-"tion is retroactive and dates back to the original establishment "of Soviet rule which was in the 1917 October revolution, as "was held by the Court of Appeal in *Aksionairnoye Obschestvo* "*A. M. Luther* v. *James Sagor & Co.* (19)." In that case, however, the question at issue was the validity of acts done by the foreign government in territory indisputably under its de facto control, and I think that the ambit of the decision was correctly stated by Bennett J., in *Haile Selassie* v. *Cable & Wireless, Ltd.* (*No.* 2) (22), where he said (23), that *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (19) had reference exclusively to the acts of a de facto government and a de jure government both recognized as such by His Majesty's Government and both claiming to have jurisdiction in the same area with reference to persons and property in that area.

Mr. Pritt suggested that *Banco de Bilbao* v. *Sancha* (24), lent some support to his argument. In that case the question at issue was as to which of two sets of persons each claiming to be the board of directors of a company incorporated in Spain and having its corporate home at Bilbao was to be treated as the legitimate board of directors. The court held that that question depended on the construction of the company's articles, that this question must be governed by the law from time to time prevailing at the place where the corporate home was set up, and that must be the law of the government recognized as the de facto government of the area which included the corporate home. It is true that the question before the court was who were entitled to be managers of the English branch of the company, but the ratio decidendi was as I have stated. I do not think, therefore, that it carries the matter any further than it was

(19) [1921] 3 K. B. 532.
(20) [1933] A. C. 289.
(21) Ibid. 297.
(22) [1939] Ch. 182.
(23) Ibid. 192.
(24) [1938] 2 K. B. 176.

carried in *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co* (25).

In the present case I am concerned not with the validity of acts done in Poland by a Polish Government, but with acts done in England by the old Polish Government which are alleged to have given rise to a contract between the defendants and persons all of whom were outside Poland. Mr. Pritt, as I have said, claimed that the retroactive principle still applied, but he found himself obliged to admit that there must be a limit to its application. Thus he conceded that if, during the twilight period, an Englishman paid in England a debt due to the Polish State to the proper officer of the old Polish Government and obtained a discharge from him, an action in the English courts at the instance of the new Polish Government to recover that debt must inevitably fail. He said, however, that the present case was not analogous because (a) the plaintiffs were Polish Nationals, and (b) the questions at issue were not the validity of a completed transaction, but whether an executory contract, or, on one view, an offer which had not yet resulted in a contract, remained in force after the recognition of the new Polish Government.

I do not think that either of these suggested distinctions affects the matter. The English Sovereign affords his protection not only to British subjects but to foreigners for the time being in England. Mr. Pritt admitted that no distinction could be made between British subjects and alien friends in England, but he said that we were dealing here with Polish subjects on Polish ships and, therefore, notionally on Polish territory. It seems to me, however, that the nationality of the plaintiffs and the ships is irrelevant, since the alleged contract of July 3, if made, was made in England, or if the matter rests on the telegram, then the offer was made from England and, having regard to its nature, acceptance by leaving the ship could only take place outside Poland. I would add that there is clear evidence that the old Polish Government was purporting up to midnight on July 5–6 to exercise control over the Polish merchant navy and no evidence that in the twilight period the new Polish Government asserted any such control.

The second distinction presents more difficulty, but I derive great assistance from the judgment of Stone C.J. in the Supreme Court of the United States in *Guaranty Trust Co.* v. *United States* (26), where the question at issue was whether a debt admitted to have been at one time due from the Guaranty Trust Company to the Provisional Government of Russia (hereinafter referred to as "the Kerensky Government"), was statute-barred at the date of issue of the writ. The answer to this question depended on whether a notice given by the Guaranty Trust Company to the representative of the Kerensky Government that, for reasons stated, the company repudiated all liability for the alleged debt, was effective to set the statute running against the Soviet Government and in favour of the Guaranty Trust Company. The Supreme Court held that it was effective.

---

(25) [1921] 3 K. B. 532.

(26) 304 U. S. 126.

The part of the judgment of Stone C.J., to which I wish to refer is as follows (27): " The Government argues that recog-" nition of the Soviet Government, an action which for many " purposes validated here that government's previous acts " within its own territory "—then follow a number of cases which I need not cite—" operates to set at nought all the legal " consequences of the prior recognition by the United States of " the Provisional Government and its representatives as though " such recognition had never been accorded. This is tantamount " to saying that the judgments in suits maintained here by the " diplomatic representatives of the Provisional Government valid " when rendered, became invalid upon recognition of the Soviet " Government. The argument thus ignores the distinction " between the effect of our recognition of a foreign government " with respect to its acts within its own territory prior to recogni-" tion, and the effect upon previous transactions consummated " here between its predecessor and our own nationals. The one " operates only to validate to a limited extent acts of a de facto " government which by virtue of the recognition has become a " government de jure. But it does not follow that recognition " renders of no effect transactions here with a prior recognized " government in conformity to the declared policy of our own " government. The very purpose of the recognition by our " government is that our nationals may be conclusively advised " with what government they may safely carry on business " transactions and who its representatives are. If those trans-" actions, valid when entered into, were to be disregarded after " later recognition of a successor government, recognition would " be but an idle ceremony, yielding none of the advantages of " established diplomatic relations in enabling business trans-" actions to proceed, and affording no protection to our own " nationals in carrying them on. So far as we are advised, no " court has sanctioned such a doctrine."

That decision is not, of course, binding on us, but I respectfully agree with every word that the Chief Justice said. I may add that, as Finnemore J. pointed out, in the present case a contrary conclusion would be particularly unfortunate, since the certificate of the Secretary of State says not only that as from

(27) 304 U. S. 141.

midnight on July 5–6, His Majesty's Government recognized the new Polish Government, but also that up to midnight His Majesty's Government recognized the old Polish Government.

Mr. Pritt pointed out that, in the United States case cited, the court was concerned with a completed transaction. I cannot, however, think that a different principle applies where the contract is executory. In either case the other party to the transaction has acquired a vested right. A fortiori must this be the case where, as here, if there is a contract, that contract was made not by the government on its own behalf, but as agent for a third party, the defendants.

A more difficult question is as to the position where the action of the old government has at the date of recognition constituted not a contract but an offer which might or might not be accepted and thus lead to a contract. On the whole I incline to think that Mr. Macdermot gave the right answer to this problem when he said that, assuming for this purpose that Mr. Kwapinski had authority to make the offer on behalf of the defendants, the offer when made became the offer of the defendants. Until accepted it could no doubt be withdrawn either by the defendants themselves or by the new Polish Government on their behalf, if the war-time legislation remained in force. Until withdrawn it could be accepted and in the present case was accepted, pursuant to the terms of the offer, by the plaintiffs by leaving their ship.

Mr. Pritt objected that this conclusion involved the infraction of a well-established principle of international law which formed part of the municipal law of this country. That principle is that there cannot be more than one government of a foreign State recognized at the same time. I accept the principle, but I do not agree that a decision in favour of the plaintiffs will infringe it. The principle truly stated is that there cannot be two governments recognized in respect of the same territory at the same time, but a recognition of the validity of the acts done by the old government, during the twilight period, outside the area under the de facto control of the new government does not, in my opinion, involve the recognition of two governments at the same time in respect of the same area. Comity seems to us to be satisfied by a recognition of the validity of the acts done by the new Polish Government during the twilight period in territory under its de facto control, and convenience requires that the validity of acts done in England by the old Polish Government during the same period should not be questioned. I would add, in passing, that no conflict is involved in the present case, since the new Polish Government has done nothing to invalidate the acts of the old Polish Government which we are considering. For these reasons I agree with the conclusion of Finnemore J. that the defence based on English law fails.

C. A.
1950

Boguslawski and Another v. Gdynia-Ameryka Linie.

Cohen L.J.

[His Lordship then considered other points raised by the defendants, mainly of Polish law, not material to this report and concluded:] For these reasons I think that the plaintiffs are entitled to retain their judgment with the variation only in the rate of interest allowed from 8 to 4 per cent.

Denning L.J. At the beginning of July, 1945, the officers and crews of the Polish merchant navy were in a quandary: the ships on which they were serving were not only Polish ships, flying the Polish flag, but they were also for all practical purposes owned and controlled by the Polish Government. That government, for instance, owned 98½ per cent. of the shares of the Gdynia-Ameryka Linie. All through the war the British Government had recognized the Polish Government which had its headquarters in London as being the government of Poland; but the end of that government was in sight. The British Government, in pursuance of an international agreement made in Yalta in the Crimea, had announced that it would soon recognize the new Polish Government which had been set up in Warsaw and that it would no longer recognize the old London Government. Many of the men thought that this foreboded ill. They foresaw that the new government in Warsaw would come under the control of the Soviet Union and they feared to go back to a Poland which was under Soviet control. They looked for a lead to their unions, and they got it. The union leaders had discussions with the Polish Minister in London, Kwapinski, and, as a result of these discussions, the Minister sent a telegram to the captains of all the ships. It said, in effect, that any officer or man who left his ship in consequence of the political situation should receive suitable compensation.

The telegram was sent out at noon on July 5. It soon reached the Polish motor vessel *Morska Wola* which was lying tied up at the Manchester end of the Ship Canal. The captain was away in London. He had probably gone to take part in the discussions. In his absence the chief officer called a meeting of the officers and read the telegram to them. He told them that suitable compensation meant that compensation equal to the amount of three months' wages would be paid to all officers and men who left the ship. The officers discussed the position, but no decision was made that day as to what they should do. They went on with their work in the ship.

Then, before anything else happened, at midnight of July 5–6, 1945, the British Government ceased to recognize the London Government as being the government of Poland and recognized the new Government in Warsaw as the government of Poland. The important question is, how did that affect the legal position? Did the telegram sent by the London minister have any continuing effect after midnight? Could the men safely act on it afterwards?

They did in fact continue to act upon it. On July 6 the chief officer of the *Morska Wola* read the telegram in the seamen's mess, and told them that the compensation would be three months' pay for those who left the ship. The seamen discussed the position but made no decision until the captain came back from London the next day, and confirmed what the chief officer had told them. Soon afterwards the men left the ship. The carpenter Stanislaw Krupka decided to leave at once and did so on July 7, although he had only joined the ship on the 4th. The second engineer Jan Boguslawski did not leave till the 11th. He gave his reasons quite simply: "I left the ship because everybody did, and I was "promised that I would get three months' wages, and because the "ship probably was going to waters under Soviet Union control "and I didn't want to go there".

Jan Boguslawski and Stanislaw Krupka now bring this action in the High Court of Justice in England claiming three months' wages. They do not bring the action against the Polish Government. They could not, of course, do that, because a foreign government cannot be impleaded in our courts. They bring it against the shipowners, the Gdynia-Ameryka Linie. They say that, when the minister sent the telegram, he sent it as supreme manager of the shipping company, and thereby bound the shipping company to pay the men three months' wages, if they left the ship; and as they left it, they are entitled by contract to that sum.

The outstanding fact in the case is that it was after July 6, 1945, that the men acted on the telegram. It is vital, therefore, to decide whether the telegram had any continuing effect after the minister ceased to be minister. Assuming that the men are right in saying that Mr. Kwapinski sent the telegram as supreme manager of the shipping company, nevertheless he was only supreme manager ex officio because he was Minister of Industry and Commerce. If his actions, as minister, had no continuing effect after midnight on July 5–6, 1945, nor did his actions as supreme manager. So the question is whether his actions as minister had any continuing effect.

On this question there is no relevant precedent to guide us, and the matter has to be considered on principle. At the outset it is necessary, I think, to consider what was the legal effect of our recognition of the Polish Government, which had its headquarters in London from 1940 until 1945. Poland itself had been overrun by the Germans and was occupied by them. But the members of the government had escaped and so had men and ships. There was for the time being no territory for the government to govern, but there were the men and the ships; and there was no reason why the government in exile should not exercise governmental functions in regard to them, provided that it had at its disposal the remedies which every government needs to enforce its decrees.

No such remedies could have been exercised in England except by the permission of our government. No other government can exercise acts of sovereignty here except with our consent. That was freely given. The exiled governments established and exercised their functions here with the consent and, indeed, on the invitation of our government. They made, for instance, decrees imposing compulsory military service on the men, and decrees requisitioning the ships. They had not the means to enforce the decrees, but the means were supplied by us. So when a Dutch national deserted from the Dutch army, he was arrested by the Metropolitan Police, and on an application for habeas corpus our courts refused to release him: see *In re Amand* (28). When the Norwegian Government made a decree requisitioning choses in action, the English courts gave effect to it, *Lorentzen* v. *Lydden & Co. Ld.* (29). I do not know that our courts would ever embark on an inquiry whether those decrees were constitutionally valid according to the pre-war constitution of the country concerned. If the exiled government was to exercise the functions of government, it must have the power to make decrees, and if the old machinery could not be operated in exile, the exiled government must be able to adapt the machinery so far as necessary for it to exercise its functions here. Otherwise our recognition of it might be rendered valueless to them and to us.

This all shows that the recognition by us of the Polish Government in London was a very special recognition. We took that government, so to speak, under our wing, and allowed them to exercise here extraordinary powers over their men and ships, and these powers were recognized and enforced by our courts. The time came later—namely, at midnight on July 5–6, 1945—when we ceased to recognize that government, but I cannot believe that the de-recognition, if I may so describe it, had any retroactive effect in respect of acts done here. It could not render invalid acts which we had previously sanctioned as valid; nor could it take away rights and obligations which had accrued only because we had permitted them to accrue.

This brings me to the next question: what was the legal effect of our recognition of the Polish Provisional Government of National Unity which was formed in Lublin on June 28, 1945? We recognized it as the Government of Poland as from midnight on July 5–6, 1945. To what extent did our recognition operate retroactively to June 28, 1945? I do not think that the certificate of the Foreign Secretary is conclusive on this point, because para. 3 expressly and correctly stated that the retroactive effect of recognition was a question of law for the courts. The matter must, therefore, be considered on principle.

(28) [1941] 2 K. B. 239.

(29) [1942] 2 K. B. 202.

In the ordinary way of course, our courts do give retroactive effect to the recognition of a government, in that we recognize the acts of that government within its proper sphere to have been lawful, not merely from the time of recognition, but antecedently, from the time that it was an effective government. Thus, if it has already made decrees transferring to itself goods and chattels within its territory and sold them to British buyers, our courts will recognize the transfer as valid: *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (30). If it has already passed legislation dissolving companies incorporated within its territory, our courts will hold the companies to be non-existent as well here as there: *Lazard Bros. & Co.* v. *Midland Bank Ld.* (31). The reason for this retroactivity is that, just as we recognize the decrees of the government subsequent to recognition to have been lawful, so also we must recognize the prior decrees to be lawful, unless, indeed, we are to say that the government must re-enact those prior decrees all over again before they can have any validity in our eyes. That would be a work of supererogation and humiliation to which that government might reasonably object, and it would be inconsistent with the sovereignty which is involved in recognition.

The retroactive effect must, however, be confined to acts of the government within its proper sphere, that is to say, acts with regard to persons and property in the territory over which it exercised effective control: *Banco de Bilbao* v. *Sancha* (32); or acts with regard to ships which are registered there and whose masters attorn to it: *Government of the Republic of Spain* v. *S.S. "Arantzazu Mendi"* (33). Just as the new government only gains its right to recognition by its effective control, so also the extent of the retroactivity is limited to the area of its effective control.

The relevant period in this case is from June 28, 1945, to midnight of July 5–6, 1945. During that week the Polish Provisional Government of National Unity had control only over the territory of Poland itself. They had no control over the men and ships who were subject to the Polish Government in London. During that time, no master of any of those ships attorned to the new Polish Government at all. It follows therefore that our recognition of the new Polish Government had no retroactive effect whatever so far as those men and ships were concerned.

The result of all this discussion is therefore that, in the eyes of our courts, right up to midnight of July 5–6, 1945, the Polish Government in London had full right and title to exercise governmental functions in respect of the men and ships of Poland who were here or had their home ports here; and as from that same midnight they ceased to have any such right or title, and the same became vested in the new Polish Government in Warsaw. There was, in short, at midnight a transfer by operation of law of all governmental functions and property from one government to the other. So far as our courts are concerned, it was nothing more than a case of an old government going out of office and a new government taking over. At such a time feelings may run high. The old government may be fearful of what the new government may do. The new government may cast suspicious eyes on what the old has done. But none of these things concerns these courts. In the eye of the law, it was simply a case of one government succeeding to another by operation of law. Upon such a succession it is obviously desirable that there should be continuity in the administration of the affairs of State, and the law will make every presumption in favour of it. Decrees which were passed by the old government will remain effective except in so far as the new government decides to repeal them. Rights and obligations which have become vested under the old government will remain intact unless the new government passes a decree divesting them, if it can lawfully do so. Orders which have been issued by the old executive may lawfully be obeyed unless the new executive countermands them. Curators who have been appointed by the old government will remain curators unless and until the new government dismisses them. So also it seems to me that offers made by the old government may lawfully be accepted during the time of the new government, unless they have meanwhile been revoked. There may be a difficulty in enforcing the ensuing contracts, because the new government cannot be impleaded in our courts. But the principle of continuity is of paramount importance. It requires that the new government should stand in the shoes of the old government in all respects except in respect of acts of members of the old government which were ultra vires, or acts which were done by them, not in good faith as trustees for the State, but for an alien and improper purpose.

---

(30) [1921] 3 K. B. 532.

(31) [1933] A. C. 289.

(32) [1938] 2 K. B. 176.

(33) [1939] A. C. 256.

Applying this principle to the telegram of Kwapinski of July 5, 1945, I am of opinion that the declaration continued to be effective under the new government, unless it was ultra vires or made in bad faith. But was it either of these?

First, was it ultra vires? The intention of Kwapinski was that the compensation should be paid out of the funds of the shipping companies: and the declaration must be read as being made by him on behalf of those companies. They were in effect undisclosed principals. But had Kwapinski, as minister, any power to bind the shipping companies by a declaration to that effect? It is quite clear that he, as minister, was also supreme manager of the shipping companies: but it was said that his only power as supreme manager was to give directions to the curator Plinius, and that, if Plinius refused to obey, as he did, the supreme manager could not do the act himself. I do not agree. It would no doubt be very exceptional for the curator to refuse, but if he did, then in Polish law, the supreme manager could do the act himself on behalf of the companies: and I think that in English law, in like circumstances, the result would be the same. The declaration was, therefore, within his powers.

Secondly, did Kwapinski make the declaration in good faith, or did he do it for an alien and improper purpose? It was argued before us that it was most detrimental to the shipping companies for the men to leave the ships and thus immobilize them: that a payment of three months' wages if they left would have the effect of inducing them to leave and was therefore unjustifiable; and it was to be inferred that the purpose of the declaration was to embarrass the new government on its taking over the ships. If that were the purpose of the declaration, I do not think it would be valid. But I am quite satisfied that this was not Kwapinski's purpose. His concern was, not to embarrass the new government, but to act fairly by the men. He thought that, on a change of management, the men should be entitled to leave the ships if they wished; and he knew that, having regard to the political situation, many of them would leave in any event, gratuity or no gratuity. In the smaller affairs of life, old servants often prefer to leave when there is a change of master, and the new master should not take it against them if they do. So here, Kwapinski thought, if the seamen chose to leave, it should not be taken against them, and that, on leaving, they ought to receive a gratuity just as much as the civil servants. These sailors had served throughout the war; they had not only saved the Polish merchant navy, they had greatly extended it; and the new government were taking over the benefits of their work. If the men elected not to stay on under the new management, that was no reason why they should not receive a gratuity for the services which they had rendered in the past. Those who chose to stay on would have the advantage of further employment and might get a gratuity later on if the new minister chose to declare it. In these circumstances it is quite impossible to say that Kwapinski was acting in bad faith or for an alien or improper purpose.

Therefore, applying the principles which I have stated, I think that it follows that, so far as the telegram is concerned, the new government stand in the shoes of the old government. The situation after midnight on July 5–6, 1945, was in this respect the same as before it: the telegram continued to have effect; it was indeed just as effective as if it had been issued by the new minister or confirmed by him. The new minister never revoked the declaration before the men left the ships. When they did leave, they became entitled to a gratuity from the shipping companies on whose behalf the declaration was made. I do not find it necessary to embark on a discussion of the Polish law about trade unions, collective agreements, and unilateral obligations, because, on the view which I take, it is a simple matter of offer and acceptance—an offer in the telegram made on behalf of an undisclosed principal, which was accepted by the conduct of the men in leaving the ships. As far as I can see, whether you apply English law or Polish law, the result is the same. The men are entitled to the money. I therefore agree that the appeals should be dismissed.

BUCKNILL L.J. I also agree that the appeals should be dismissed. On either view of the effect of the certificate of recognition signed by the British Foreign Secretary, the acts of the old Polish Government in England from June 28 to midnight July 5–6, 1945, were valid and binding, at any rate unless and until the new Polish Government rescinded or repudiated them.

Appeals dismissed.

Solicitors : *Constant and Constant; Hilder, Thompson and Dunn.*

C. G. M.

1950
July 24.

Lord Goddard, C.J., Byrne and Donovan, JJ.

O'DEA *v.* TETAU.

Bastardy—Affiliation order—Child born abroad—Foreign mother domiciled abroad—Jurisdiction of justices—Bastardy Laws Amendment Act, 1872 (35 *&* 36 *Vict. c.* 65), *ss.* 3, 4.

The bastardy laws of this country have no application where a bastard, or a child appearing to be a bastard, is born out of the country of a woman domiciled abroad. Where, therefore, a German woman resident and domiciled in Germany gave birth to a bastard child in Germany and was granted by a magistrate an affiliation order against the putative father, an Englishman, in this country.

Held, that the order was made without jurisdiction.

Reg. v. *Blane* (1849) 13 Q. B. 769, followed; *Rex* v. *Humphrys and Others, Ex parte Ward* [1914] 3 K. B. 1237, explained.

CASE STATED by London Quarter Sessions.

On April 18, 1950, the appellant, Edward O'Dea, appealed against an affiliation order made against him as putative father on February 21, 1950, on the application of the respondent, Annaleise Tetau, at West London Magistrates' Court.

1950

O'DEA
v.
TETAU.

On the hearing of the appeal the following facts were proved or admitted:—The mother was a single woman for the purposes of the Bastardy Laws Amendment Act, 1872, and gave birth to a son on August 15, 1949, at Hamburg. She was a German born in Germany, and at the time of the birth of the child was domiciled and resident there. In November, 1949, at the instance of the putative father, she came to England with her son and had resided here since. On her summons taken out in January, 1950, a metropolitan magistrate adjudged the appellant the putative father of the child and ordered him to pay 10*s.* a week until the child attained the age of 16 years.

It was contended for the putative father before quarter sessions that, since the child was born abroad of a foreign mother having a foreign domicile at the date of his birth, the magistrate had no jurisdiction to make the order having regard to *Reg.* v. *Blane* (1).

It was contended for the mother that that case was no longer good law.

Quarter sessions being of opinion that the facts were indistinguishable from those in *Reg.* v. *Blane* (1) and that they were bound by that decision, held that neither they nor the magistrate had power to make the affiliation order.

The mother appealed.

I. H. Jacob and *Langdon-Down* for the mother. The court held in *Reg.* v. *Blane* (1) that a child born out of this country was not the subject of our bastardy laws, but in *Rex* v. *Humphrys, Ex parte Ward* (2) it was held that such a child was the subject of our laws provided that the mother had an English domicile. There is a fundamental distinction between the two cases. The governing factor in *Reg.* v. *Blane* (1) was the place of birth of the child, while that in *Rex* v. *Humphrys* (2) was the domicile of the mother. The principle in the latter case is correct and should be extended. All that is required of the mother is that she satisfy s. 2 of the Poor Law Amendment Act, 1844. This may occur in any one of three events: (*a*) if the child is born in this country; (*b*) if the child is born abroad of an Englishwoman domiciled in this country; (*c*) if the child born abroad of a foreign woman is a bastard by the laws of her domicile. It is the third alternative which the mother here satisfies. It can clearly be seen from the judgments in *Reg.* v. *Blane* (3) that the court, in deciding that case, considered the bastardy laws as part of the poor law of this country, and disregarded entirely the domicile of the mother of a child born abroad. The decision in *Rex* v. *Humphrys* (4) departed from the decision in *Reg.* v. *Blane* (5) and it was the domicile of the mother that was the governing factor of that decision.

---

(1) (1849) 13 Q. B. 769.

(2) [1914] 3 K. B. 1237.

(3) 13 Q. B. 769, 772, 773.

Reliance is placed on the judgment of Lush, J., in *Rex* v. *Humphrys* (6), in which he said: "I can see nothing in the "language either of the earlier Act of 7 and 8 Vict. c. 101 or of "the amending Act of 1872 to indicate that unless the child is "born in England or Wales the Act does not apply".

There is nothing to prevent magistrates from inquiring what the foreign law is, evidence of which is a matter of fact, because all that is required by the section as a condition precedent to the mother's obtaining an order is that she proves that she has been delivered of a bastard child.

The Bastardy Acts were passed with the view of relieving the rates and imposing the burden of maintaining a bastard child on the putative father instead of the parish in which the child was born. When the Bastardy Laws Amendment Act, 1872, was passed, there had been no fundamental change of the poor law as there has been since the passing of the Poor Law Act, 1930.

Craymer for the putative father was not called on to argue.

LORD GODDARD, C.J. It is important to look at the enactment in force at the time of the decision in *Reg.* v. *Blane* (7), namely, s. 2 of the Poor Law Amendment Act, 1844, which provided: "And be it enacted, that any single woman who may "be with child, or who may be delivered of a bastard child, after "the passing of this Act, or who has been delivered of a bastard "child within the period of six calendar months before the "passing of this Act, may . . . before the birth . . . of such child, "or at any time thereafter, upon proof that the man alleged to be "the father of such child has within the twelve months next after "the birth of such child paid money for its maintenance, make "application to any one justice of the peace acting for the petty "sessional division of the county, or for the city, borough, or "place in which she may reside, for a summons to be served on "the man alleged by her to be the father of such child; and if "such application be made before the birth of the child, the "woman shall make a deposition upon oath stating who is the "father of such child, and such justice of the peace shall thereupon issue his summons to the person alleged to be the father ". . .".

That was the law in 1849 when a Frenchwoman domiciled in France brought bastardy proceedings against a man in this country, and the court decided that the bastardy laws did not apply. Lord Denman, C.J., in his very short judgment in *Reg.* v. *Blane* (8), said: "Assuming that the magistrate who made "this order has examined the law of France, and ascertained "that according to that law the child is a bastard, we are clearly "of opinion that children born out of this country are not the "subject of our bastardy laws. I will only add that the "principles of humanity are not concerned in this decision; for "every destitute person in this country has a right to main-"tenance as casual poor".

---

(4) [1914] 3 K. B. 1237.
(5) 13 Q. B. 769.
(6) [1914] 3 K. B. 1237, 1243.
(7) 13 Q. B. 769.

Observe what the Lord Chief Justice decided. He said that, even assuming that the child was a bastard according to French law, in his opinion children born out of the country were not the subject of the bastardy laws. Coleridge, J., gave a long judgment, and, having pointed out that the bastardy laws in their origin were designed to relieve the parish where the child was born of the obligation to maintain it, he said (9): "The legisla-"ture in all these statutes is obviously dealing with bastards "born in some parish; that is, in this country. The word "'bastard' therefore has always been used by the legislature in "a sense known to our law, and as denoting all the incidents "which belong to the status of bastardy according to our law. "If the word 'bastard' is, on the other hand, to comprehend "any bastard born in any part of the world, an immense field of "inquiry must be traversed respecting the status of children "according to the different laws of different countries. On this "ground, I am of opinion that this order is bad". Erle, J., said: "It is quite clear that our statutes relating to bastardy never "contemplated the case of a child born a bastard in a foreign "country".

Those judgments seem to me to lay down in the clearest possible terms, by a court of very considerable authority, that the bastardy laws of this country have no application where a bastard or a child appearing to be bastard is born out of the country.

Then came *Rex* v. *Humphrys; Ex parte Ward* (10), a case which in some respects is somewhat difficult to understand. The highest at which, it seems to me, that decision can be put is that the majority of the court considered that, if the applicant were an English subject and domiciled in this country, she could obtain a bastardy order notwithstanding that she was actually delivered of the child out of the country. The odd thing is that Bankes, J., having laid that down, quotes the judgment of Lord Denman, C.J., in *Reg.* v. *Blane* (11) and says (12): "The Lord Chief

---

(8) 13 Q. B. 772.
(9) 13 Q. B. 773, 774.
(10) [1914] 3 K. B. 1237.
(11) 13 Q. B. 772.
(12) [1914] 3 K. B. 1241.

1950

O'DEA v. TETAU.

Lord Goddard, C.J.

"Justice meant that the case in question was clearly one in "which the status of the child had to be ascertained according "to French law, and that, even assuming that the magistrate "had examined the law of France and ascertained that according to that law the child was a bastard, he still thought that "the case was not subject to the bastardy laws. With that I "entirely agree".

I can only think that the judge entirely agreed with that, having regard to the rest of the judgment, for one of two reasons. First, because perhaps it had not been made clear in the affidavit on which certiorari was moved that the woman was not domiciled in this country, and she was assumed to be a British subject. I think also that he may have meant that he agreed with *Reg.* v. *Blane* (13) because in that case the mother was a foreigner and was domiciled out of the country, whereas in the case which he was considering the mother was an English subject and domiciled in this country.

Lush, J., who agreed with Bankes, J., after saying that he could see nothing in the language of the Act of 1844 or the Bastardy Laws Amendment Act, 1872, to indicate that the Act of 1844 did not apply unless the child were born in England or Wales, went on (14): "If the mother domiciled and resident in "England goes to Scotland and is confined there and then "returns to the place where she was formerly resident, I see "nothing to suggest that in that case the statute does not "apply. On the other hand there is much to indicate that the "Act would not apply when the mother is a foreigner and the "child is born abroad". Avory, J., dissented from that and said that, in his opinion, the case was entirely covered by the judgments in *Reg.* v. *Blane* (13).

The matter which impresses me is, that the legislature, which must be presumed to have had knowledge of the decision in *Reg.* v. *Blane* (13), passed the Bastardy Laws Amendment Act, 1872, but did not in any way purport to overrule the decision in *Reg.* v. *Blane* (13) or to make any provision that would have the effect of enabling the courts to distinguish that case. The Act of 1872 did, however, provide that the application could be made at any time within twelve months after the return to England of the man alleged to be the father of the child. That provision was not in the Poor Law Amendment Act, 1844, so the legislature must have considered the case of one parent returning to this country. They provided for what was to happen if the father were out of England and within what time after his return he could be brought before the court. No provision was made, however, with regard to the mother who was out of

---

(13) 13 Q. B. 769.

(14) [1914] 3 K. B. 1243.

England when the child was born, and no right was given to her to apply to the court on her return.

In my opinion, *Reg.* v. *Blane* (15) must be regarded as good law. It has never been reversed. The grounds on which it was distinguished in *Rex* v. *Humphrys* (16), do not exist in this case. Some day it may have to be considered whether the grounds upon which it was distinguished are correct, and if so, which line of authority the court should follow. That does not arise in this case because the grounds on which the court distinguished *Rex* v. *Humphrys* (16) from *Reg.* v. *Blane* (15) do not exist here. Accordingly, in my opinion, quarter sessions were right in considering that they were bound by *Reg.* v. *Blane* (15), and this appeal must be dismissed.

Byrne, J. I agree.

Donovan, J. I agree. With diffidence, I would say that, in my view, *Rex* v. *Humphrys* (16) is not irreconcilable with *Reg.* v. *Blane* (15) if one remembers the difference in the facts In *Reg.* v. *Blane* (15) there was no question of the woman's being domiciled here: she was a Frenchwoman, described as a native of France, whose domicile of origin was therefore presumably French. There was no evidence of her having acquired a new domicile of choice. To my mind, a domiciled Englishwoman ought to have the right to apply for an affiliation order because, as is pointed out in *Rex* v. *Humphrys* (16), she may have gone abroad merely to hide her shame and to come back after the birth.

The reason why, in my opinion, she in fact has such a right is because under s. 3 of the Bastardy Laws Amendment Act, 1872, it must be ascertained whether the child is a bastard. That means a bastard subject to English law. If the mother's domicile is English, English law applies to her personal status and also to that of her child, and, therefore, the child is a bastard within the meaning of s. 3. In the present case, the domicile of the mother is German, and, therefore, her child is not a bastard child within the meaning of s. 3. The mother wants to show that the child is a bastard under German law, but, in my opinion, s. 3 contemplates no such inquiry.

Appeal dismissed.

Solicitors: *Samuel Dalton; Cliftons.*

L. F. J. McD.

(15) 13 Q. B. 769.

(16) [1914] 3 K. B. 1237.

Reversed. H.L. [1951] 2 All E.R. 617.

C. A.

1950
May 23, 24;
June 21.

Bucknill and
Denning, L.JJ.,
and
Roxburgh, J.

Reversed.
[1952] A.C. 166

BRITISH MOVIETONEWS LD. *v.* LONDON AND DISTRICT CINEMAS LD.

Contract—Supply of newsreel films—Frustration—No frustrating event —Uncontemplated turn of events—Contract terminated.

By an agreement dated July 5, 1941, film distributors agreed to supply their newsreels to exhibitors for showing at a theatre at ten guineas a week for a minimum period of twenty-six weeks, the agreement to be thereafter determinable by four weeks' notice; but there was a provision that the exhibitors might terminate the agreement by one month's notice at any time after the first month. The newsreels were still being shown under the agreement, when by the Cinematograph Film (Control) Order, 1943 (made under Defence Regulation 55, which had been passed under the Emergency Powers (Defence) Act, 1939), no person in the film industry was to acquire or supply any film except under the authority of a licence granted by the Board of Trade. At the time there was a great demand for raw film for military purposes and the Board of Trade only granted the distributors of newsreels two-thirds of the amount of raw film which they had previously used. At that time, the newsreels were practically all war films supplied by film service units, and they played a considerable part in the war effort. The order under reg. 55 was made " for securing the public safety, the defence of the " realm, the maintenance of public order and the efficient prosecu- " tion of any war in which His Majesty may be engaged, and for " maintaining supplies and services essential to the life of the com- " munity ". See s. 1, sub-s. 1, of the Act of 1939.

The parties to the original agreement made a supplemental agreement dated May 3, 1943, by which (1.) the original agreement was to remain in full force and effect until such time as the order of 1943 was cancelled and, thereafter, for any unexpired period stipulated in the original agreement; (2.) one newsreel could be used to serve two exhibitors during the same period, and this was, if necessary, to be deemed to include newsreels supplied by other distributors; there being five distributors of newsreels; (3.) the same rental was to be paid by the exhibitors, whoever supplied the newsreels; and (4.) the conditions of the original agreement were to remain in force in so far as they were not excluded or modified by the supplemental agreement.

The Emergency Powers (Defence) Act, 1939, expired on February 24, 1946, and was replaced by the Supplies and Services (Transitional Powers) Act, 1945. The Cinematograph Films (Control) Order, 1943, was continued in force: but the continuation was no longer for the purposes stated in the Act of 1939, but " for the " purpose of so maintaining, controlling and regulating supplies " and services as (*a*) to secure a sufficiency of those essential to the " well-being of the community or their equitable distribution or " their availability at fair prices . . . ". See s. 1, sub-s. 1, of the Act of 1945.

On July 15, 1946, the Board of Trade took off all restrictions on cinematograph films except on "the acquisition of newsreel prints "by a distributor for distribution in the United Kingdom". In 1947, the Supplies and Services (Extended Purposes) Act, 1947, was passed, which enabled regulations and orders to be continued in force, inter alia, "for reducing imports from any countries and for "redressing the balance of trade": and the Cinematograph Film (Control) Order, 1943, was continued in use accordingly.

After the war, newsreels ceased to consist largely of war films. On May 24, 1948, the exhibitors gave four weeks' notice to terminate the agreements with the distributors, and at the end of that period stopped taking their newsreels. The order of 1943 being still in force, the distributors sued the exhibitors, claiming that, by virtue of the supplemental agreement, the latter must still continue to pay to the distributors ten guineas a week until the order of 1943 was cancelled.

Held, that the parties could not have contemplated that the order of 1943 would have been continued so long, in such different circumstances, in peace-time and on account of the dollar shortage. Where, as here, the ensuing turn of events was so completely outside the contemplation of the parties when they made their supplemental agreement that the court was satisfied that the parties, as reasonable people, could not have intended that the contract should apply to the new situation, then the court would read the words of the contract in a qualified sense: it would restrict them to the circumstances contemplated by the parties; would refuse to apply them to the uncontemplated turn of events; would do what was just and reasonable; and would bring them into accord with the scope of the contract. The principle to be applied was not based on a term implied by the parties: it was a qualifying power exercised by the court. Even though the contract was absolute in its terms, it was not absolute in intent, and it could not be held absolute in effect: supervening events had struck away its foundations.

Accordingly, the court held that the supplemental agreement had ceased to apply before May, 1948, and that the exhibitors were justified in then giving their four weeks' notice to terminate the original agreement.

Principles stated by Lord Wright in *Constantine (Joseph) Steamship Line Ld.* v. *Imperial Smelting Corporation Ld.* [1942] A. C. 154, 184–7, and *Denny Mott and Dickson, Ld.* v. *James B. Fraser & Co. Ld.* [1944] A. C. 265, 275, applied.

Parkinson (Sir Lindsay) & Co. Ld. v. *Commissioners of Works and Public Buildings* [1949] 2 K. B. 632, followed.

Decision of Slade, J., reversed.

Appeal from Slade, J.

On July 25, 1941, the plaintiffs, film distributors, agreed to supply their newsreels to the defendants, film exhibitors, for showing at the Pavilion Theatre, Aylesbury, at ten guineas a week for a minimum period of twenty-six weeks, and thereafter determinable by four weeks' notice. It was agreed, however, that notwithstanding the minimum period of twenty-six weeks the exhibitors might terminate the agreement by one month's notice at any time after the first month. Newsreels were still being distributed under this agreement when by the Cinematograph Film (Control) Order, 1943, dated March 19, 1943, and made under Defence Regulation 55 which had been made under the Emergency Powers (Defence) Act, 1939, no person in the film industry was to acquire or supply any film except under the authority of a licence granted by the Board of Trade. At that time there was a great demand for raw film for military purposes and the Board of Trade only granted the distributors of newsreels two-thirds of what they had previously used. At that time the newsreels were practically all war films supplied by film service units, and they played a considerable part in the war effort.

In consequence of the order, the distributors and the exhibitors made a supplemental agreement dated May 3, 1943. It recited the principal agreement of July 25, 1941, and continued: " Whereas by the Cinematograph Film (Control) Order, " 1943, it has become necessary to restrict the consumption of " raw film stock, now it is hereby agreed as follows: 1. That " during the continuance of the Cinematograph Film (Control) " Order, 1943, the following special conditions shall apply to the " principal agreement: (*a*) The principal agreement shall remain " in full force and effect until such time as the said order is " cancelled and thereafter for any unexpired period stipulated " in the principal agreement. (*b*) One copy of a newsreel will if " necessary be used to serve two exhibitors during the same " period, and this shall, if necessary, be deemed to include news-" reels supplied by other distributors not parties hereto . . . " (*d*) The stipulated rental payable under the principal agreement " shall continue to be paid irrespective of ownership of the film " which is supplied to the exhibitor and notwithstanding that the " same may not be that stipulated for in the principal agreement " or not actually supplied by the distributor party hereto. . . . " 3. All the conditions of the principal agreement shall remain in " full force and effect in so far as the same are not excluded, " modified or varied hereby ".

Paragraph 1 (*b*) referred to a " cross-over " system under which one newsreel was made to serve two cinemas in one town by being sent from one cinema to the other during the performance and thus being shown at both. The newsreels of the various distributors—there were five of them—were made interchangeable. There was no difficulty about that, at the time, since the newsreels were nearly all war films. The exhibitors bound themselves to take the films, since that was in the national interest. The arrangements were made under the aegis of the Board of Trade. The order had been made under reg. 55 because it appeared by the terms of the regulation to be necessary in the interests of the defence of the realm, or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community.

The Emergency Powers (Defence) Act, 1939, expired on February 24, 1946, and was replaced by the Supplies and Services (Transitional Powers) Act, 1945. The Cinematograph Film (Control) Order, 1943, was continued in force. It was no longer continued for the same purposes but " for the purpose of so maintaining, controlling and regulating supplies and services as (*a*) to " secure a sufficiency of those essential to the well-being of the " community or their equitable distribution or their availability " at fair prices . . .": see s. 1 sub-s. 1, of the Act of 1945.

On July 15, 1946, the Board of Trade took off all restrictions on cinematograph films " except the acquisition of newsreel " prints by a distributor for distribution in the United Kingdom ". In 1947 the Supplies and Services (Extended Purposes) Act, 1947, was passed which enabled regulations and orders to be continued in force inter alia " for reducing imports . . . from all or any " countries and for redressing the balance of trade ".

After the war, newsreels ceased to consist largely of war films. On May 24, 1948, the exhibitors gave four weeks' notice to terminate the agreements with the distributors and at the end of that period stopped taking the newsreels. At that time the Film (Control) Order, 1943, was still in force. The distributors brought this suit claiming that the exhibitors, whether they took the newsreels or not, by virtue of the supplemental agreement of May 3, 1943, must continue to pay 10*l*. 10*s*. a week until the order of 1943 was cancelled. Slade, J., upheld this contention, and the defendants, the exhibitors, appealed.

Sir Roland Burrows, *K.C.*, *Colin Pearson*, *K.C.*, and *Kenneth Potter* for the defendants, the exhibitors. By the agreement of July 25, 1941, the distributors agreed to supply their newsreels to the exhibitors for exhibition at ten guineas a week for a minimum period of twenty-six weeks and thereafter determinable by four weeks' notice. The supplemental agreement of May 3, 1943, amended this provision to include in the minimum period —twenty-six weeks and thereafter—the period of the continuance of the order. The supplemental agreement did not affect the provision in the original agreement that " notwithstanding the " minimum period of twenty-six weeks the exhibitors might " terminate the agreement by one month's notice at any time " after the first month ".

Defence Regulation 55 was made under the Emergency Powers (Defence) Act, 1939, as being necessary or expedient " for securing the public safety, the defence of the realm, the "maintenance of public order and the efficient prosecution of "any war in which His Majesty may be engaged and for maintaining supplies and services essential to the life of the "community". When the Act of 1939 expired on February 24, 1946, normally a defence regulation made under it would have expired with it: see *Watson* v. *Winch* (1) and *Wicks* v. *Director of Public Prosecutions* (2). The Cinematograph Film (Control) Order was preserved, no longer for the purposes for which it was originally made—"services essential to the life of "the community"—but for the purposes specified in s. 1, sub-s. 1, of the Supplies and Services (Transitional Powers) Act, 1945, "for the purpose of so maintaining, controlling and "regulating supplies and services as (*a*) to secure a sufficiency of "those essential to the well-being of the community or their "equitable distribution or their availability at fair prices". The exhibitors contend that, upon the true construction of the supplemental agreement, the special conditions which it attached to the principal agreement were applicable only so long as the order of 1943 should remain in force as an order having effect by virtue of the powers conferred by the Act of 1939. The order was passed to maintain supplies of raw film, then in short supply and essential to the life of the community in war; it was continued to ensure the equitable distribution of raw film which was essential to the well-being—not the very life—of the community in time of peace. In 1947 the Supplies and Services (Extended Purposes) Act, 1947, was passed, which enabled regulations and orders to be continued in force, amongst other things, for "reducing imports . . . from all or any countries and "for redressing the balance of trade". In 1948, therefore, when the exhibitors terminated the agreement, the order was in force for the purpose of preserving dollars. On July 15, 1946, the Board of Trade took off all restrictions on cinematograph films "except the acquisition of newsreels prints by a distributor for "distribution in the United Kingdom".

In May, 1948, the life of the community was no longer in jeopardy. Raw film was no longer required in quantity for the Forces of the Crown. The newsreels were no longer required as propaganda and the subjects of their pictures were those of peace and not of war. The pictures of one newsreel distributor were very different from those of another; they were of different patterns. There was no national interest which required newsreels to be shown.

It is plain that what had happened since 1943 was so completely outside the contemplation of the parties when they made their supplemental agreement in 1943 that they could not have

---

(1) [1916] 1 K. B. 688.

(2) [1947] A. C. 362.

C. A.

1950

British Movietonews Ld.
v.
London and District Cinemas Ld.

intended that their contract should apply to such a situation. Subsequent events have struck away the foundations of the contract. The supplemental agreement must have ceased to apply on February 24, 1946, when the Emergency Powers Defence Act, 1939, expired; or, at all events, long before May 24, 1948, when the distributors gave notice to terminate the agreement: see *Parkinson (Sir Lindsay) & Co. Ld.* v. *Commissioners of Works* (3), *Bush* v. *Whitehaven Trustees* (4), and *Jackson* v. *Union Marine Insurance Co. Ld.* (5); also *Metropolitan Water Board* v. *Dick Kerr & Co. Ld.* (6). Parties with their minds concerned with the particular objects about which they are contracting are apt to use words, phrases or clauses which, taken literally, are wider than they intend: see the judgment of Devlin, J., in *Chandris* v. *Isbrandtsen-Moller Co. Inc.* (7).

The defence is based on three points: (1.) on the true construction of the supplemental agreement, (2.) on an implied term in it, and (3), not on any supervening event, which might produce a case of true frustration, but on such a change of circumstances since the contract was made that the case is analogous to that of frustration. The parties, when they made this agreement, could not have envisaged its terms as applying to such a condition of affairs.

These cases shade into each other, because they all really concern the question whether the supplemental agreement applied to an entirely new situation, which could not have been contemplated by the parties, when the supplemental agreement was made. On the first point, see the principles stated by Lord Wright in *Inland Revenue Commissioners* v. *Raphael* (8); on the second, see the judgment of MacKinnon, L.J., in *Shirlaw* v. *Southern Foundries* (9); and on the third, Lord Wright's speeches in *Joseph Constantine Steamship Line Ld.* v. *Imperial Smelting Corporation Ld.* (10) and *Denny Mott & Dickson Ld.* v. *James B. Fraser & Co. Ld.* (11).

On these facts the court should read this supplemental contract in a qualified sense and restrict it to the circumstances contemplated by the parties. It is submitted that the exhibitors were entitled to give their notice determining the contract on May 24, 1948.

[Denning, L.J., referred to Lord Sumner's speech in *Hirji Mulji* v. *Cheong Yue Steamship Co. Ld.* (12).]

(3) [1949] 2 K. B. 632.

(4) (1888) 52 J. P. 392 (Div. Court); Hudson on Building Contracts, Vol. 2, 122 (4th ed.) (Div. Court and C. A.).

(5) (1874) L. R. 10 C. P. 125.

(6) [1918] A. C. 119.

(7) [1950] 1 All E. R. 768, 772.

(8) [1935] A. C. 96, 142.

(9) [1939] 2 K. B. 206, 227.

(10) [1942] A. C. 154, 184–7.

(11) [1944] A. C. 265, 275.

(12) [1926] A. C. 497, 509–10.

Paull, K.C., and *T. G. Roche* for the distributors. The question arises what was the basis of the supplemental agreement. It was either the Cinematograph Film (Control) Order, 1943, itself, or the restriction imposed. "Whereas by the Cinematograph "Film (Control) Order, 1943, it has become necessary to restrict "the consumption of raw film stock, now it is hereby agreed as "follows". That restriction still exists. In the case of newsreels, a licence has still to be obtained from the Board of Trade, and dollars have to be found for film produced. It is clear that the intention of the parties was that the supplemental agreement should still subsist as long as the restriction was there, and no longer. When the restriction should go, the original agreement only was to subsist. Counsel for the exhibitors say that the supplemental agreement came to an end on February 24, 1946, when the Emergency Powers (Defence) Act, 1939, expired; but the restriction—the reason given in the contract itself for its existence—did not then come to an end. The whole basis of the contract is the shortage of film and the consequent restriction. Clearly here there is no case of frustration: see the speech of Viscount Simon, L.C., in *Cricklewood Property and Investment Trust Ld.* v. *Leighton's Investment Trust Ld.* (13). Sir Roland Burrows asks in effect, what is the present emergency? Is it an emergency of war? Or an emergency of lack of supplies and services? Or an emergency caused by lack of dollars? The emergency which caused this agreement was the shortage of film, which still persists; and if the reason for the shortage of film differs in 1948 from what it was in 1943, that is and always was of little concern to the parties. The parties have chosen to make the restriction of film the test, and the court will not remake their contract in favour of one party or the other.

The only conceivable ground on which it could be said that the supplemental agreement has been terminated is to postulate an implied term in the agreement. But no such term can be formulated consistent with the authorities.

[*Sir Roland Burrows.* The implied term would be that the supplemental agreement continued for the duration of the emergency contemplated by the Emergency Powers (Defence) Act, 1939, under which and for the purposes of which alone the order was made in 1943. When that Act came to an end on February 24, 1946, there came to an end the purposes for which the order was made and so the supplemental agreement.] There is no clause in the agreement from which such an implication can be derived. The parties have chosen to use words of precision from which their meaning is clear, and the court will not alter the contract. As a matter of interpretation, on the contention of the exhibitors cl. 1 (*a*) of the supplementary agreement is completely otiose, and cl. 3 of no effect.

---

(13) [1945] A. C. 221.

[Lord Atkin's speech in *Southern Foundries* (1926) *Ld.* v. *Shirlaw* (14) referred to.]

Sir Roland Burrows, K.C., replied.

Cur. adv. vult.

June 21. DENNING, L.J., read the following judgment: The question in this case is whether an agreement, which was made during the war for the exhibition of newsreels, is still in force. That agreement was expressed to remain in full force and effect " during the continuance of the Cinematograph Film (Control) " Order, 1943 ", and that control order does still continue. So the film distributors insist that the agreement still remains in force. But the exhibitors say that the circumstances have changed so much that it has come to an end. [His Lordship stated the facts and continued:] The first point taken by the defendants, the exhibitors, is that they were entitled by the terms of the two agreements taken together to give four weeks' notice to determine them. They say that in the principal agreement there was a special condition enabling them, notwithstanding the minimum period of twenty-six weeks, to determine the agreement on four weeks' notice. They say that this special condition still remains in full force and effect notwithstanding that the supplemental agreement introduced a new minimum period, namely, " during the continuance of the Cinematograph Film " (Control) Order, 1943 ". This is an attractive argument, but I doubt whether it is correct. The supplemental agreement says distinctly that the principal agreement shall remain in full force and effect " until such time as the said order is cancelled ". That seems to be inconsistent with any power to terminate beforehand. Any special condition enabling the distributors to terminate by four weeks' notice is clearly gone. So also the special condition providing for prior determination by the exhibitors also goes.

The second point taken by the exhibitors is that the supplemental agreement must be regarded as having come to an end on February 24, 1946, when the Emergency Powers (Defence) Act, 1939, expired, or at any rate before they gave notice in May, 1948. They say that the change of circumstances justifies this conclusion. It cannot be doubted that there was a great change of circumstances. In 1943 the war was still on. The Cinematograph Film (Control) Order, 1943, was made under Defence Regulation 55, which in turn was made under the Emergency Powers (Defence) Act, 1939. It was only made

(14) [1940] A. C. 701, 716–17.

because it appeared to be necessary or expedient "for securing "the public safety, the defence of the realm, the maintenance "of public order and the efficient prosecution of any war in "which His Majesty may be engaged, and for maintaining "supplies and services essential to the life of the community". No doubt it was expedient in 1943 to make the order in order to maintain the supplies of raw film which were essential for the life of the community.

But after February 24, 1946, the order could not be justified on that ground. The war was over. The life of the community was no longer in jeopardy. The military forces no longer required raw film with which to take photographs of the enemy positions. They were being demobilized. The service film units were being disbanded. The newsreels were no longer all of one pattern, filled with war films supplied by the Services' departments. They were supplied by the producers who had to go out to find their own subjects and make their own photographs. So the newsreels of one distributor might be of a very different pattern from those of another.

This change of circumstances was reflected by a change in the statutes. The Emergency Powers (Defence) Act, 1939, expired on February 24, 1946, and was replaced by the Supplies and Services (Transitional Powers) Act, 1945. The Cinematograph Film (Control) Order, 1943, was continued in force, but it was no longer continued for the same purposes. It was only continued because it appeared to be necessary or expedient "for the purpose "of so maintaining controlling and regulating supplies and "services as (*a*) to secure a sufficiency of those essential to the "well-being of the community or their equitable distribution or "their availability at fair prices". No doubt supplies of raw film were essential to the well-being of the community, and no doubt in February, 1946, they were in short supply and it was expedient to continue the order so as to secure their equitable distribution. But this is a very different justification for the order from that which held during the war. Then supplies of film were essential to the "life of the community". Now they were only essential to its "well-being".

In the course of 1946 it evidently became easier to obtain supplies of films, because on July 15, 1946, the Board of Trade took off all restrictions on cinematograph films "except the "acquisition of newsreel prints by a distributor for distribution "in the United Kingdom". This meant that films were free of any control for all purposes and for all persons—big film companies and small home photographers alike—except for newsreels. It may be that newsreels used up so much raw film that there was not at that time enough available to free them too. But, as more supplies became available, this particular restriction might not be justified on the ground of shortage alone. It might have to be justified by additional grounds such as conserving dollars. If we imported less raw film, we spent less dollars; and one way of keeping down the imports of raw film was by keeping the restriction on newsreels. So long as the restriction existed, it was an inducement for the trade to keep the "cross-over" arrangements which meant, of course, that less film would be used and less dollars expended. This change of circumstances was reflected by another change in the statutes. The Supplies and Services (Extended Purposes) Act, 1947, was passed which enabled the regulations and orders to be continued in force, amongst other things, "for reducing imports . . . "from all or any countries and for redressing the balance of "trade".

To sum up these changes, therefore, the Cinematograph Film (Control) Order, 1943, was made in 1943, in order to maintain supplies of raw film which was essential to the life of the community in time of war. It was continued after February 24, 1946, in order to ensure the equitable distribution of raw film which was essential to the well-being of the community in time of peace, but which then was in short supply owing to the difficulties of transition from war to peace. It was continued after July, 1946, for newsreels alone, probably in order to maintain the cross-over arrangements, and thus import less raw film and save dollars. Alongside these changes in the legal position, there were the great changes in the general situation. In 1943, when the supplemental agreement was made, the war was on, the newsreels of all five distributors were all of one pattern, being nearly all war films supplied by the service units, the exhibitors were expected, if not required, to show them in the national interest, and there was a shortage of raw film owing to military need. In 1948, when the exhibitors gave notice to terminate, the war was over, the newsreels of the five distributors were of different patterns, being made by the various producers on their own lines, and there was no national interest which required them to be shown. There was still a restriction on raw film for newsreels but this was not owing to military needs, but to conserve dollars. In this new situation, rival views may be entertained as to what is the best policy. Why, it may be asked, should not an exhibitor be able to give up taking the newsreels if he wants to? That would appear to save raw film, not expend it. But, it may be answered, the cross-over arrangement is the best way of saving film. It is dependent on all exhibitors being parties to it; and if any one can fall out if he likes, the whole arrangement is imperilled. These arguments of policy are, however, not for us. We must consider the legal position without regard to them.

C. A.
1950

British Movietonews Ld.
v.
London and District Cinemas Ld.

Denning, L.J.

The contest is a familiar one. On the one hand, the distributors point to the letter of the contract and say that it governs the case. The words " during the continuance of the Cinematograph Film (Control) Order, 1943 ", are plain enough. So apply them. The order still continues. On the other hand, the exhibitors say that, as events have turned out, we must disregard the letter of the contract and look to what the parties really had in mind. The order was made in war to cover war conditions. The parties did not contemplate that it would be continued in peace, and they should not be held bound to it now.

Sir Roland Burrows, who appeared for the exhibitors, put his argument on three grounds: (1.) On the true construction of the supplemental agreement; (2.) on an implied term in it; and (3.) on the change of circumstances, since it was made, which was, he said, analogous to a frustration. But he said that these three grounds shaded into one another, because they were all really concerned in finding out whether the contract applied in the new situation. I agree with him. Let me explain why. (1.) When we construe a contract, we see whether the parties have actually expressed in words an intention which covers the situation, and we apply the principles stated by Lord Wright in *Inland Revenue Commissioners* v. *Raphael* (15). (2.) When we imply a term, we recognize that the parties have not expressed themselves in words which cover the situation, but we impute to them an intention which, we say, they would have expressed if they had put their minds to it, and we apply the principles stated by Bowen, L.J., in *The Moorcock* (16), and by MacKinnon, L.J., in *Shirlaw* v. *Southern Foundries* (17). (3.) When we say that a contract does not apply in a new situation because it is frustrated, we recognize that the words are wide enough to cover the situation, but we hold that they do not apply because the parties did not contemplate such a surprising turn of events, and we apply the principles stated by Lord Wright in *Joseph Constantine Steamship Line Ld.* v. *Imperial Smelting Corporation Ld.* (18), and *Denny Mott & Dickson Ld.* v. *James B. Fraser & Co. Ld.* (19).

In these frustration cases, as Lord Wright said, the court really exercises a qualifying power—a power to qualify the absolute, literal or wide terms of the contract—in order to do what is just and reasonable in the new situation; and it can now by statute make ancillary orders to that end. Until recently the court only exercised this power when there was a frustrating event, that is a supervening event which struck away the foundations of the contract. But in the important decision of *Parkinson & Co. Ld.*

(15) [1935] A. C. 96, 142.
(16) (1889) 14 P. D. 64, 68–70.
(17) [1939] 2 K. B. 206, 227.
(18) [1942] A. C. 154, 184–7.
(19) [1944] A. C. 265, 275.

v. *Commissioners of Works* (20), this court exercised a like power when there was no frustrating event, but only an uncontemplated turn of events. The facts were that under a building contract the employer stipulated, in addition to the contract work, for power to order extra work without any stated limit, and it was expressly provided that the sum to be paid to the contractor "should not be greater than the actual cost plus a net profit "remuneration of £300,000". The parties had contemplated that the work would cost about £5,000,000, but there was no provision in the contract to that effect. Extras were ordered, bringing the total cost up to £6,683,056. The employers paid that sum, plus the profit of £300,000. The contractors then claimed extra profit because of the extra work, and, despite the absolute terms of the contract, this court held that they were entitled to reasonable extra remuneration on this account.

The judgments, if I may say so, are so valuable that they should be read in full, and I will not venture to read extracts from them. They are based on *Bush* v. *Whitehaven Trustees* (21), which in turn was based on the leading frustration case of *Jackson* v. *Union Marine Insurance Co. Ld.* (22). The judgments show that, no matter that a contract is framed in words which taken literally or absolutely, cover what has happened, nevertheless, if the ensuing turn of events was so completely outside the contemplation of the parties that the court is satisfied that the parties, as reasonable people, cannot have intended that the contract should apply to the new situation, then the court will read the words of the contract in a qualified sense; it will restrict them to the circumstances contemplated by the parties; it will not apply them to the uncontemplated turn of events, but will do therein what is just and reasonable.

This principle, as Devlin, J., has since pointed out, is the same principle as that which underlies the ejusdem generis rule and the suspension clauses in frustration cases: see *Chandris* v. *Isbrandtsen-Moller Co. Inc.* (23). It is, as he says, a recognition of the fact that parties with their minds concerned with the particular objects about which they are contracting are apt to use words, phrases or clauses which, taken literally, are wider than they intend or, I may add, cover situations which they never contemplated. Recognizing this fact, the court refuses to apply them literally to an uncontemplated turn of events.

This does not mean that the courts no longer insist on the binding force of contracts deliberately made. It only means that they will not allow the words, in which they happen to be

---

(20) [1949] 2 K. B. 632.

(21) 52 J. P. 392 (Div. Court); Hudson on Building Contracts, Vol. 2, 122 (4th ed.) (Div. Court and C. A.).

(22) L. R. 10 C. P. 125.

(23) [1950] 1 All E. R. 768, 772.

C. A.
1950

British Movietonews Ld.
v.
London and District Cinemas Ld.

Denning, L.J.

phrased, to become tyrannical masters. The court qualifies the literal meaning of the words so as to bring them into accord with the true scope of the contract. Even if the contract is absolute in its terms, nevertheless if it is not absolute in intent, it will not be held absolute in effect. The day is done when we can excuse an unforeseen injustice by saying to the sufferer "It is your own "folly. You ought not to have passed that form of words. You "ought to have put in a clause to protect yourself". We no longer credit a party with the foresight of a prophet or his lawyer with the draftsmanship of a Chalmers. We realize that they have their limitations and make allowances accordingly. It it better thus. The old maxim reminds us that Qui haeret in litera, haeret in cortice, which, being interpreted, means: He who clings to the letter, clings to the dry and barren shell, and misses the truth and substance of the matter. We have of late in this court paid heed to this warning, not only in *Parkinson's* case (24), but also in *John Lee & Son (Grantham) Ld.* v. *Railway Executive* (25), *Dennis Reed Ld.* v. *Goody* (26), and *Bennett Walden & Co.* v. *Wood* (27), and we must pay like heed now.

Applying these principles, the supplemental agreement says that it is to apply, "during the continuance of the Cinematograph "Film (Control) Order, 1943". Those words, taken literally, mean that the supplemental agreement is in full force and effect today, for the order still continues and may for aught one knows, continue for a long time yet. But the parties cannot have contemplated that the order would ever last so long. It was an order made in wartime to deal with war conditions, and they must have contemplated that it would be cancelled at or shortly after the end of the war. They cannot have contemplated that it would be continued in peacetime to deal with dollar shortages —certainly not that it would still be continuing five years after the war had ended. That being so, the court should not apply the agreement in this uncontemplated turn of events.

Mr. Paull says (and he puts it in the forefront of his argument) that the court can only do this by virtue of an implied term; and he challenged Sir Roland Burrows to formulate the term which should be implied. That is, I think, a fallacy, because the principle to be applied is not based on a term implied by the parties; it is a qualifying power exercised by the courts. But, if it is necessary to formulate the term, I think that Sir Roland gave the right answer when he said that it was to be implied that the supplemental agreement continued for the duration of the emergency contemplated by the Emergency

(24) [1949] 2 K. B. 632.
(25) (1949) 65 T. L. R. 604.
(26) [1950] 2 K. B. 277.
(27) [1950] 2 All E. R. 134.

C. A.
1950

BRITISH MOVIETONE NEWS LD.
v.
LONDON AND DISTRICT CINEMAS LD.

Denning, L.J.

Powers (Defence) Act, 1939, under which and for the purposes of which alone the order was made in 1943 and, therefore, came to an end when that Act came to an end on February 24, 1946, and with it the purposes for which the order was made.

In my opinion the supplemental agreement ceased to apply before May, 1948, and the defendants, the exhibitors, were entitled to give, as they then did, four weeks' notice to terminate the principal agreement. The appeal should therefore be allowed and the action dismissed with costs.

BUCKNILL, L.J. I agree that the appeal should be allowed for the reasons given by Denning, L.J., in the judgment which he has just delivered, and I do not think that I can usefully add anything to it.

ROXBURGH, J. I agree.

Appeal allowed.

Solicitors: *Sydney Morse & Co.; Freshfields.*

C. G. M.

Affirmed. C.A. [1951] 1 All E.R. 982.

Affirmed. [1951] 2 K. B. 284

EARL FITZWILLIAM'S WENTWORTH ESTATES CO. *v.* MINISTER OF TOWN AND COUNTRY PLANNING AND OTHERS.

1950
July 11, 12; 31.

Birkett, J.

Town and Country Planning—Land ripe for development—Owners' refusal to sell at existing use value—Compulsory purchase order by Central Land Board—Validity—Acquisition of Land (Authorisation Procedure) Act, 1946 (9 & 10 *Geo.* 6, *c.* 49)—*Town and Country Planning Act,* 1947 (10 & 11 *Geo.* 6, *c.* 51), *s.* 43, *sub-ss.* 1, 2, 4.

By s. 43, sub-s. 1, of the Town and Country Planning Act, 1947, "The Central Land Board may, with the approval of the "Minister [of Town and Country Planning], by agreement acquire "land for any purpose connected with the performance of their "functions under the following provisions of this Act, and in particular may so acquire any land for the purpose of disposing of "it for development for which permission has been granted under "Part III of this Act on terms inclusive of any development "charge payable under those provisions in respect of that development". By sub-section 2 the board may be authorized by the Minister "if he is satisfied that it is expedient in the public "interest" to acquire land compulsorily for the purposes of s. 43, sub-s. 1.

Of the "following provisions" referred to in s. 43, sub-s. 1, the most important are in s. 61, which relates to the ascertainment of development values, and s. 70, which relates to the fixing of development charges.

The true construction of s. 43, sub-s. 1, and of the expression "in particular" and the following words, is that they give separate power not limited to the purposes, such as the ascertainment of development values and the fixing of development charges, for which power is given in the first part of the sub-section.

Owners of a plot of land refused to part with it to a person wishing to build a house on it except on a lease for 300 years at 20*l.* a year ground rent inclusive of the assignment to the prospective lessee of the owner's claim in respect of the plot on the 300,000,000*l.* compensation fund established under the Act of 1947. The prospective lessee had obtained permission under Part III of the Act to build a house on the plot, and then applied to the Central Land Board to make for his benefit a compulsory purchase order in respect of the land as the owners were refusing to lease the land to him at its existing use value. The board had issued a circular explaining the incidence of development charge and suggesting three methods of selling land to persons wishing to build on it, each method providing for the payment of development charge to the board and the payment for the land of a price reflecting that payment whether made by the buyer or by the seller. The board, on the prospective lessee's application, wrote to the owners that they were asking a price for it based on the value the land would have had if the Act of 1947 had not been passed, and inquiring whether they were prepared to follow any, and if so which, of the three courses suggested by the board. The owners replied that they would follow none of them. The local authority having intimated that it was desirable that the plot should be immediately available for building, the board made a compulsory purchase order under s. 43, sub-s. 2, which the Minister of Town and Country Planning confirmed. On the landowners' appeal against the confirmation order,

Held, that the board had power under the second part of s. 43, sub-s. 1, to make the compulsory purchase order in order to assist in the accomplishment of the desired development; and that, while, *semble*, the board were not entitled to exercise the power in question merely for the purpose of enforcing their policy that land should only be sold at a price based on existing use value, as the evidence did not establish that the order was made for that purpose only, it was valid (the Minister having certified as to its expediency) notwithstanding that the enforcement of that policy might have been one of the motives behind the making of the order.

MOTION to quash a confirmation order made by the Minister of Town and Country Planning.

The following statement of the facts is taken from the judgment of Birkett, J.:—The applicants are the owners of large estates in Ecclesfield in the city of Sheffield. They have been developing these estates for over thirty years by leasing plots of land for 300 years on building leases. In August, 1948, one Rodgers approached the applicants for a lease of a plot of land on which to build a house. He was told that he could have a lease for 300 years at an annual rent of 20*l.* 10*s.* inclusive of the assignment of the benefit of the owners' claim on the 300,000,000*l.* fund in respect of this plot, and that he would have to pay the development charge.

On August 16, 1948, Rodgers obtained permission under Part III of the Town and Country Planning Act, 1947, to build a house on the plot of land, and on October 7, 1948, his architect wrote to the Central Land Board: " As the land agent does not " propose to lease this land to my client at present use value, " will you please make a compulsory purchase order or lease " for the benefit of my client. I presume that I shall be informed " of your present use value and have the opportunity of agreeing " to the price before the purchase or lease is completed ".

On November 1, 1948, the board wrote as follows to the surveyors acting for the applicants: " The Central Land Board " understand that you are acting for a client who wishes to " dispose of land at Whirlow Lane, Sheffield. The board have " been informed that the price which your client is asking for " the land is 20*l.* 10*s.* per annum ground rent (inclusive of the " assignment of the right to claim a payment in respect of the " development value of the land out of the 300,000,000*l.* set aside " under the provisions of the Act). This price appears to approxi" mate to the level of prices obtained for similar land in the " neighbourhood before the Act came into operation. I enclose " a document which sets out three methods which, in the view " of the board, should be adopted by landowners. The board " will be glad to know as soon as possible whether your client " is prepared to adopt one of these alternatives, and if so, which".

An affidavit sworn by Sir William Robert Fraser, the deputy chairman and secretary of the Central Land Board, stated: " The principal reason which prompted the Central Land Board " to publish the said document was that notwithstanding that " the Town and Country Planning Act, 1947, had come into full " operation on July 1, 1948, the nature and effect of the provi" sions of Part VI and VII of the Act did not appear sufficiently " to be known to persons wishing to purchase land on which to " erect a house for their own occupation or even to some land" owners offering plots for sale; with the result that plots of " land were continuing to be bought and sold at prices which " did not reflect the fact that the ownership of land no longer " carried with it the right to develop the land, and that a liability " to pay a substantial development charge would arise if develop" ment in fact took place. It appeared, moreover, to the board " that it would be of assistance to both vendors and purchasers " in deciding what was the fair price to be paid for land that "the amount of development charge payable in respect of an "intended development should be ascertained on the application "of the vendor and if desired be paid by him even though the "development would not be carried out by the vendor but by "a purchaser. As provisos (*a*) and (*b*) to s. 70, sub-s. 1, of "the Act empower the board to refuse to make this facility "available, it seemed the more desirable to make it clear that "the board would in fact make it available in suitable cases".

The "document" to which the secretary referred was a circular entitled "House 1", and read as follows: "Advice on "buying and selling a site for building a house. The Town and "Country Planning Act, 1947, has entirely changed the basis "of sales of land required for building a house. This pamphlet "suggests methods for negotiation between a seller of land on "which the building of a house is intended in the near future, "and a purchaser of land who wants to build a house . . .

"Advice to buyers. The following advice is offered to anyone "who wants to buy (or take a lease of) a piece of land for a "house:—(1.) Remember that building value now belongs to the "State, and not to the seller. (2.) Always ask first (and before "the price is settled) whether the development charge is going "to be paid to the Central Land Board by you or the seller. "(3.) Do not buy as part of the purchase price of the land the "seller's claim on the 300,000,000*l*. fund. The right to a payment from the fund is not yet established and its amount "cannot yet be known. The amount will in any case be related "to the circumstances of the owner of the land on July 1, 1948, "and not to those of any new buyer. A buyer of such a claim "is therefore buying a risk at a 'certainty' price. (4.) If the "seller agrees to pay the development charge, ask him the "amount which he has agreed with the Central Land Board. "You can then safely pay building value for the land in the "knowledge that you yourself will not be liable for any development charge, when the seller has paid it. (5.) If you are to "pay the development charge (and, unless the seller is willing "to pay it, you will have to do so) you should never pay the "building value for the land. If you do, you will be charged "the building value over again in your development charge. You "should pay what is known as existing use value and no more. "A rough guide to existing use value of land is its value to use it "as it is actually being used (as, for example, agricultural, allotment, or garden land) with a prohibition against erecting any "building on it except for agriculture.

"Advice to sellers. Three courses, which will be fair to "buyers who want a house immediately, are open to sellers of "land: (A) to sell the land at existing use value, leaving the "buyer to pay the development charge (method A). (B) The "seller to pay (or agree with the board to pay) the development "charge; to disclose the amount of this charge to the buyer; "and then to sell the land at a fair price, including the development charge, direct to the person who wishes to erect the "house. This method, after discussion and agreement with the "board, can be used either for sale to named buyer, or by public "or other advertisement, or by auction (method B). (C) The "seller to pay the development charge; erect the house himself; "and then sell the house and land at a fair price, including the "development charge (method C).

"Owners of land with building value on July 1, 1948, have "been given a right by the Act to make a claim before March 31, "1949, upon the fund of 300,000,000*l.* set aside to meet varying "cases of hardship. No promise has been given that everyone "will be paid the whole of the market value of his loss of building "rights. Indeed clear statements have been made to the contrary, and that some will receive the whole loss and that some "will not. The decision will not be made (except in the cases "of certain 'near-ripe' land) until 1952 or 1953, and then, by a "scheme which will require affirmative approval by Parliament, "payments will be made in 1953.

"A sale of land therefore at a price which includes building "value is unfair to buyers for two reasons: (1.) it passes on the "claim to the purchaser at a definite amount, whereas the claim "is as yet unestablished and the amount is unknown; (2.) it "forces the purchaser to pay for building value twice over in two "immediate payments (the purchase price and the development "charge). This places an intolerable burden on persons who "have been carefully selected for a building licence on their "urgent need for a house.

"In normal cases, therefore, where an owner is not prepared "to sell at a price related to method A, B or C, the Central "Land Board will have to consider the various compulsory "purchase powers in the Act. If sellers will sell, and purchasers "will only buy as advised in this pamphlet, land can be sold "at a price which will not hinder or prevent houses being built".

On November 5, 1948, the surveyors replied: "In regard to "your final paragraph, we are instructed that our client is not "disposed to adopt any of the alternatives set out in the document referred to".

The Central Land Board communicated with Sheffield Corporation about the site in question and other sites, and, on December 4, 1948, the town clerk informed the board that the corporation had "expressed the opinion that it is in the public "interest that the sites to which you refer should be made "immediately available for housing development". The letter continued: "Sewerage and water facilities are available in "respect of each site and each is within a proposed residential "zone, and planning permissions have been granted. I enclose "for your information copy of the letter which the city engineer "has sent to me on the matter". That letter from the city engineer stated: "Whirlow Lane. Planning permission was "granted by the [corporation] in August, 1948, to the erection "of a dwelling-house and garage in Whirlow Lane for Mr. G. N. "Rodgers. . . . I have ascertained that sewerage and water "facilities are available, in which case, and in view of the acute "shortage of houses, I am of the opinion that the sites should be "made available for housing development".

On December 23, 1948, the Central Land Board wrote to the surveyors: "With reference to your letters of November 5 and "30, 1948, the board note that your clients are not prepared to "adopt any of the approved methods described in the pamphlet "'House 1'. As far as the board are aware, the land is "not the subject of a certificate under s. 80 of the Town and "Country Planning Act, 1947. The board have noticed that "planning permission for the erection of houses on the above "sites has been granted and that licences will be granted to "the would-be purchasers. It appears, therefore, that the "approved development may be hindered, if not prevented, "unless the land is made available. The board have therefore "requested the district valuer, as a matter of urgency, to "negotiate with you for the immediate purchase of the land on "the basis provided in s. 51 of the Town and Country Planning "Act, 1947. This basis the board considers to be the reasonable "terms mentioned in s. 43, sub-s. 2, of the Act" (1).

The district valuer was unable to reach a settlement agreeable to the applicant company and Rodgers, and on May 13, 1949, the board resolved: "That it was desirable to acquire the land in

---

(1) Town and Country Planning Act, 1947, s. 43, sub-s. 1: "The "Central Land Board may, with the "approval of the Minister, by agree"ment acquire land for any purpose "connected with the performance of "their functions under the following "provisions of this Act, and in par"ticular may so acquire land for the "purpose of disposing of it for "development for which permission "has been granted under Part III of "this Act on terms inclusive of any "development charge payable under "those provisions in respect of that "development".

Sub-section 2: "If the Minister "is satisfied that it is expedient in "the public interest that the board "should acquire any land for any "such purpose as aforesaid, and that "the board are unable to acquire the "land by agreement on reasonable "terms, he may authorise the board "to acquire the land compulsorily in "accordance with the provisions of "this section".

Sub-section 4: "Any land "acquired by the Central Land "Board under the provisions of this "section shall be disposed of by them "in accordance with such directions "as may be given to them in that "behalf by the Minister, and until "the land is so disposed of the board "may manage it in accordance with "such directions".

"Whirlow Lane, Sheffield, for the purpose of disposing of it for "development for which planning permission has been granted "on terms inclusive of any development charge payable in respect "of that development, and that, as the board were unable to "acquire the said land by agreement on reasonable terms, an "order be made to acquire the land compulsorily".

On June 22, 1949, the board made an order as follows:— "Subject to the provisions of this order the board are, under "s. 43 of the Town and Country Planning Act, 1947, hereby "authorized to purchase compulsorily for the purpose of disposing "of it", and the order then followed the words of the resolution.

On July 20, 1949, an objection was made to that order on behalf of the applicants on the grounds: "(1.) That the order is "ultra vires, in that it has been made to secure an object which "it is not within the board's powers to achieve, namely, that "the estates company shall bear the loss, if any, resulting from "the vesting of the development rights in the State by virtue of "the Town and Country Planning Act, 1947, and shall not be "permitted to make it a condition of sale that the purchaser "shall stand in their shoes. (2.) That it is not expedient in the "public interest that the board should acquire land included in "the order. (3.) That the terms on which the estate company "would be prepared to lease the land are reasonable. Our clients "desire to have an opportunity of appearing before and of being "heard by a person appointed by you for the purpose".

Accordingly, on August 30, 1949, there was a hearing at Sheffield, presided over by an official of the Ministry of Town and Country Planning, and on December 3, 1949, the Minister made a confirming order as follows:—"Whereas on June 22, "1949, the Central Land Board, in pursuance of s. 43 of the "Town and Country Planning Act, 1947, made an order in "accordance with the provisions of Sch. I to the Acquisition of "Land (Authorisation Procedure) Act, 1946, for the compulsory "acquisition of certain land described in the schedule thereto, "and have submitted the said order to the Minister of Town and "Country Planning (hereinafter called 'the Minister') for confirmation; and whereas the Minister is satisfied that it is "expedient in the public interest that the board should acquire "the said land and that the board are unable to acquire the land "by agreement on reasonable terms; and whereas the Minister "has taken into consideration the objection made to the said "order; and whereas the Minister is satisfied that the said order "should be confirmed: now therefore the Minister in pursuance "of all the powers enabling him in that behalf hereby confirms "the said order in the form set out in the schedule hereto."

1950

Earl Fitzwilliam's Wentworth Estates Co. v. Minister of Town and Country Planning.

The applicant company now sought to have that confirmation order quashed under para. 15 of Sch. I to the Acquisition of Land (Authorisation Procedure) Act, 1946.

H. A. Hill for the company.

Sir Hartley Shawcross, A.-G., and *J. P. Ashworth* for the respondents, the Minister and the board.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

July 31. Birkett, J., read the following judgment:—Perhaps it would be as well if I were to say that I am not concerned with merits in this case. The Town and Country Planning Act, 1947, imposes, no doubt, considerable burdens upon landowners and it has been the subject of acute controversy. The steps taken by landowners to ease or to shift the burdens, or to alter the views of the Central Land Board on what they may regard as a proper way in which the provisions of the Act should be carried out, are not matters on which I am required to express any opinion on the merits. I am concerned only—and I desire to emphasize this—with the precise case before me and the special facts applicable to that case, and to determine whether the Central Land Board had the power to make the compulsory purchase order in this case under the Act of 1947 without regard to merits on the one side or the other, and to determine whether the Central Land Board have exercised their powers properly.

The Acquisition of Land (Authorisation Procedure) Act, 1946, concerns procedure relating to the making and the confirmation of compulsory purchase orders. Para. 15 of Sch. I to the Act provides: "(1.) If any person aggrieved by a compulsory purchase order desires to question the validity thereof, or of any provision contained therein, on the ground that the authorization of a compulsory purchase thereby granted is not empowered to be granted under this Act or any such enactment as is mentioned in s. 1, sub-s. 1, of this Act . . . he may, within six weeks from the date on which notice of the confirmation or making of the order or of the giving of the certificate is first published in accordance with the provisions of this Schedule in that behalf, make an application to the High Court, and on any such application the court—(*a*) may by interim order suspend the operation of the compulsory purchase order or any provision contained therein, or of the certificate, either generally or in so far as it affects any property of the applicant, until the final determination of the proceedings; (*b*) if satisfied that the authorization granted by

" the compulsory purchase order is not empowered to be granted " as aforesaid, or that the interests of the applicant have been " substantially prejudiced by any requirement of this Schedule " or of any regulation made thereunder not having been complied " with, may quash the compulsory purchase order or any provi" sion contained therein, or the certificate, either generally or in " so far as it affects any property of the applicant ".

But it is the Act of 1947 that is the all-important statute which introduces far-reaching changes in the law of town and country planning. The Town and Country Planning Acts, 1932 and 1943, are wholly repealed as from July 1, 1948, by s. 113, sub-s. 2, of the Act of 1947, and by Sch. IX, pt. II; and that of 1944 is also repealed save for the important sections of the Act which are preserved and amended in Sch. XI to the Act of 1947. Planning the right use of land is a comparatively late development in social legislation, but successive Acts of Parliament have strengthened planning powers as growing experience has dictated. Immediately before the Act of 1947, speaking quite generally, the owner of land could not develop his land just as he liked. He was compelled to observe the planning restrictions in force; but, if the planning restrictions were relaxed or removed to permit development, the owner was under no liability to pay any charges for the removal or relaxation. The Act of 1947 made very great changes. It is a very comprehensive, a somewhat complicated, and a rather difficult statute, and as the years pass many important questions arising out of it will call for an answer.

The statute was first published in Bill form on January 7, 1947, and it received the Royal Assent on August 6, 1947. It repealed existing planning schemes as from the appointed day, July 1, 1948. As a general rule it required permission for all development. The most important change of all, perhaps, was what is sometimes called the acquisition of development rights by the State; and it is not unimportant to observe that in the title of the Act of 1947 it is expressed to be an Act, among other things, " to secure the recovery for the benefit of the community " of development charges in respect of certain new develop" ment ". For the carrying out of development for which planning permission is required a development charge is payable to the Central Land Board. The local planning authority decides whether any particular form of development may be carried out, and, subject to the powers of the Minister, it is the local planning authority who are concerned primarily with the policy of town and country planning. The Central Land Board, which from most points of view may be regarded as a new government department set up under the Act, would not appear generally to be concerned with policy of that kind so much as with fiscal matters. It collects the development charges and it administers the funds designed by the Act to alleviate causes of hardship, the war damage fund and the fund of 300,000,000*l*. reserved for compensation for loss of development value.

The Act of 1947 provided by s. 64, sub-s. 2, that the right to receive a payment out of the 300,000,000*l*. fund was transmissible by assignment or by operation of law as personal property. That compensation would appear to be payable once and for all, and is not dependent on the time when the land is developed, nor is it related to any particular kind of development. The total compensation is limited to 300,000,000*l*. and it is uncertain whether claimants will receive the full amount of their claim. Some claimants will no doubt receive preferential treatment; but it is quite impossible today to say what the ordinary claimant will ultimately get. The development charge is certain; the compensation is uncertain, and one cannot be set against the other in the ordinary way.

[His Lordship stated the facts as set out above, and continued:] Mr. Hill, for the applicant company, submitted that the order of June 22, 1949, had been made in the present case because the company had refused to accept the board's policy as laid down in the circular "House 1", and that it was made in order to compel the company to conform to the board's policy that land should not be sold at a price greater than its existing use value, and as a reprisal for their refusal to conform. He further submitted that it was not within the powers conferred by s. 43 of the Act of 1947 for the board to make a compulsory order for that purpose. He submitted that there was no express provision in the Act so empowering the board, that if Parliament had intended that the board should have this power for this purpose it would have said so; and that if Parliament had intended that land should not be sold at a price greater than its existing use value it could have made it an offence so to do as it had made certain specific things offences in ss. 26, 28, 29, 32 and 74.

Mr. Hill cited in support of those submissions *Galloway* v. *London Corporation* (2). The headnote reads: "Where persons "have special powers conferred on them by Parliament for "effecting a particular purpose they cannot be allowed to "exercise those powers for any purpose of a collateral kind. "Therefore, a company authorized (making due compensation) "to take compulsorily the lands of any person for a definite "object may be restrained by injunction from any attempt to "take them for another object. Where the legislature has "conceded power to a body of adventurers for a certain purpose "(as for example the formation of a railway) such a body must "show some ground for the concession. . . . Where, therefore,

(2) (1866) L. R. 1 H. L. 34.

"the Mayor and Commonalty of the City of London had been "intrusted with powers to make certain public improvements in "the City, and for that purpose had been authorized compulsorily "to take land, to raise money on the credit of it, and to sell "*superfluous* land to pay off the debt, the Act which gave them "those powers, though only thus implied by authorizing them to "take more land than might be absolutely necessary to effect the "desired improvements, might be construed favourably to them, "and lands so taken might be treated as lands taken 'for the "'purposes of the Act'". Lord Cranworth, L.C., said (3): "The case of the appellant, Mr. Galloway, rested on a principle "well recognized, and founded on the soundest principles of "justice. The principle is this, that when persons embarking "in great undertakings, for the accomplishment of which those "engaged in them have received authority from the legislature "to take compulsorily the lands of others, making to the latter "proper compensation, the persons so authorized cannot be "allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which "the legislature has invested them with extraordinary powers".

Mr. Hill, in those first two submissions, was saying that the Town and Country Planning Act, 1947, had conferred certain compulsory purchase powers on the Central Land Board and that it must be shown that when they exercised those powers they were covered by the Act, and that they exercised them for purposes laid down by the Act and not for any other collateral purpose.

Mr. Hill also cited *Sydney Municipal Council* v. *Campbell* (4). The headnote reads: "The appellants had statutory power to "acquire compulsorily land required for the purpose of making "or extending streets, also land required for 'carrying out "'improvements in or remodelling any portion of the city'. "In connexion with the extension of a street, they resolved "to acquire the respondents' land for the latter purpose. They "had previously been restrained from acquiring the land for the "extension, on the ground that it was not really required for "that purpose, but that its purchase was desired because of its "probable increase in value. No plan for improving or remodelling the area was considered or proposed, and evidence "as to proceedings in the council showed that the appellants "were endeavouring to give a new form to the transaction "previously decided upon, rather than considering whether the "respondents' land was required for improving or remodelling. "*Held*, that the evidence sustained the lower court's conclusion of fact that the appellants were exercising their

---

(3) L. R. 1 H. L. 43.

(4) [1925] A. C. 338.

"powers for a purpose differing from those specified by "the statute, and that they had rightly been restrained "from acquiring the respondents' land". Duff, J., delivering the judgment of the Privy Council, said (5): "The "legal principles governing the execution of such powers as "that conferred by s. 16, in so far as presently relevant, are "not at all in controversy. A body such as the Municipal "Council of Sydney, authorized to take land compulsorily for "specified purposes, will not be permitted to exercise its powers "for different purposes, and if it attempts to do so, the courts "will interfere. As Lord Loreburn said in *Clanricarde (Marquess)* "v. *Congested Districts Board* (6): 'Whether it does so or not "'is a question of fact'. Where the proceedings of the council "are attacked upon this ground, the party impeaching those "proceedings must, of course, prove that the council, though "professing to exercise its powers for the statutory purpose, is "in fact employing them in furtherance of some ulterior object".

As I gathered, Mr. Hill was submitting that what the Central Land Board had done in this case was to use their powers to enforce a policy which they themselves had conceived, namely, that of ensuring that land should not be sold at prices in excess of existing use values, and Mr. Hill said that that was not valid by the Act of Parliament. Therefore, he made his first two submissions.

He submitted, further, that to compel owners to lease or sell land on terms which the board considered fair and reasonable would be a serious restriction on the common-law right to subcontract freely, and that common-law right ought not to be taken away by implication but only by express provisions such as are contained, for example, in the Building Materials and Housing Act, 1945, the Rent Restriction Acts and the Landlord and Tenant Act, 1927. He further submitted that Parliament, having by s. 51 of the Act of 1947 ensured that all land required for public purposes could be acquired at its existing use value, had left to private individuals the right to make their own contracts unfettered. In the present case, it would appear from the affidavit of the secretary of the board that the existing use value of this land was 35*l.* only, but that with permission to develop it might be worth as much as 462*l.*, a difference of 427*l.*

Mr. Hill submitted that it was no part of the function of the Central Land Board to secure the building of houses by local authorities or private persons, that being the duty of the Minister of Health and local authorities under the Housing Acts, 1936 and 1949; and that any action of the applicant company which it might be thought would hinder or even prevent the building of houses was not a concern of the Central Land Board and afforded no reason for implying any power in the Act of 1947, which was not there in express terms. The power to acquire land, he submitted, conferred on the Central Land Board by s. 43, sub-s. 1, of the Act of 1947 for the purpose of disposing of it for development for which planning permission had been granted, was not a separate and independent power, but a power which could only be exercised in connexion with the performance by the board of their functions under the Act. The power conferred by the second part of the sub-section was limited by the power conferred by the first part. If the power were intended to be separate and independent the words "in particular" would not have been inserted as the statute would have made it plain. If it were an independent power it would be more liberal than any such power of compulsory purchase hitherto conferred, and would enable the Central Land Board to acquire and dispose of land for the purpose of securing the proper planning of the area, a function expressly entrusted by the Act to local authorities in ss. 38 and 39 and Sch. XI. Finally, he argued that the functions of the Central Land Board are confined to the assessment and collection of the development charge and matters relating thereto, and do not include the function of seeing that land is not sold at a price greater than its existing use value. If in fact Rodgers in the present case had acquired the land in question on the applicant company's terms it would have made no difference to the board so far as any of their functions were concerned.

---

(5) [1925] A. C. 343.

(6) (1914) 13 L. G. R. 415, 418.

It was contended on behalf of the board and the Minister that the powers of the board under s. 43 had been properly exercised and that, in any event, the power given in the second part of s. 43, sub-s. 1, was a separate and independent power enabling the board to do exactly what they had done in the present case. That being so, the decision of the board at the meeting on May 13, 1949, and the decision of the Minister could not be impugned and, indeed, could not be inquired into. It having been conceded that both deponents acted in complete good faith, the matter, it was contended, was concluded: the board and the Minister must decide, and the courts could not inquire into the matter.

The Attorney-General cited on that submission *Point of Ayr Collieries Ld.* v. *Lloyd-George* (7). The headnote reads: "Control of the appellants' undertaking was taken by the Ministry of "Fuel and Power by an Order made under the Defence (General) "Regulations, 1939 (St. R. & O., 1939, No. 927), reg. 55 (4). The "appellants contended that there were no adequate grounds upon "which the Minister could find as he stated he had found, "namely, that it was necessary to take control in the interests

---

(7) [1943] 2 All E. R. 546.

1950

EARL FITZWILLIAM'S WENTWORTH ESTATES CO. *v.* MINISTER OF TOWN AND COUNTRY PLANNING.

Birkett, J.

"of the defence of the realm and the efficient prosecution of the "war and for maintaining supplies and services essential to the "community. *Held*, there was no jurisdiction to interfere with "what was an admittedly bona fide decision of the Minister "within his delegated authority. The exercise of executive "power under such a regulation cannot be questioned in the "courts and can be questioned only in Parliament".

Lord Greene, M.R., said (8): "If one thing is settled beyond "the possibility of dispute, it is that, in construing regulations "of this character expressed in this particular form of language, "it is for the competent authority, whatever Ministry that may "be, to decide as to whether or not a case for the exercise of the "powers has arisen. It is for the competent authority to judge "of the adequacy of the evidence before it. It is for the competent authority to judge of the credibility of that evidence. "It is for the competent authority to judge whether or not it "is desirable or necessary to make further investigations before "taking action. It is for the competent authority to decide "whether the situation requires an immediate step, or whether "some delay may be allowed for further investigation and perhaps "negotiation. All those matters are placed by Parliament in "the hands of the Minister in the belief that the Minister will "exercise his powers properly, and in the knowledge that, if he "does not do so, he is liable to the criticism of Parliament. One "thing is certain, and that is that those matters are not within "the competence of this court. It is the competent authority "that is selected by Parliament to come to the decision, and, if "that decision is come to in good faith, this court has no power "to interfere, provided, of course, that the action is one which "is within the four corners of the authority delegated to the "Minister".

I understood from Mr. Hill that if the Central Land Board had in fact the power claimed, which he denied, then it would not be competent for this court to inquire into the facts upon which they had come to the conclusion that they ought to exercise it.

The Attorney-General submitted further, that, even if one of the considerations in the mind of the board had been to enforce their view as to the sale of land at existing use value, nevertheless the board, as they had the power to acquire land for the purpose of disposing of it for development for which permission had been granted under Pt. III of the Act of 1947 on terms inclusive of any development charge payable under the provisions of the Act, and as they were unable to acquire the land by agreement on reasonable terms, were entitled in the circumstances of

(8) [1943] 2 All E. R. 547.

this case to exercise the power. Alternatively, if the power in the second part of s. 43, sub-s. 1, were not a separate and independent power, the compulsory purchase order made in this case was not outside the functions of the board, and one of the functions of the board might reasonably be taken to be to see that land was not sold at a price greater than its existing use value in all the circumstances of this case.

He referred to a statutory instrument, the Town and Country Planning (Development Charge) Regulations, 1948 (S.I. 1948, No. 1189), which recites the powers of the Minister to make regulations himself. By reg. 2: "Subject to the provisions of "the Act and of any regulations made thereunder and for the "time being in force, the general principles set out in the "schedule to these regulations shall be followed by the board in "determining under Pt. VII of the Act whether any, and if so "what, development charge is to be paid thereunder in respect "of any operations or use of land". Para. 1 of that schedule reads: "Development charge shall be determined so as to secure, "so far as is practicable, that land can be freely and readily "bought and sold or otherwise disposed of in the open market at "a price neither greater nor less than its value for its existing "use. This object is the governing principle by which the board "are to be guided in determining development charge".

Counsel for the applicant company expressly asked that I should make a decision on the facts relating to the making of the compulsory purchase order. He invited me to say that the reason why the board made the order in the present case was because the company declined to adopt any of the three methods set out in the board's circular, and to further the policy of the board that land should not be sold at a price greater than its existing use value, and to punish the company for their non-conformity.

The Attorney-General submitted that if the board in fact possessed the power to make the order, the exercise of the power was not rendered invalid if one of the reasons for making it had been the desire to enforce particular policies. Having the power, the exercise of it was a matter for the board and the Minister, and not for the court.

Mr. Hill submitted that the reasons which he gave, and which I have stated, were the reasons for making the order, and that the board had no power to make it under the powers conferred on them by the Act of 1947.

I think that I ought to say here before proceeding further that if the issue in this case had been one of this comparative simplicity, whether the powers conferred on the Central Land Board were powers which enabled them to exercise and to enforce a policy that land should not be sold at a price greater than its existing use value, I should have held that the board had no such power. If it were conclusively shown, for example, that the board had exercised their compulsory powers under s. 43 with the sole purpose of enforcing the policy of ensuring that land should not be sold save at existing use prices, I should be of the opinion that their power of compulsory purchase under the statute could not be used for that purpose, but the issue is not quite so simple as that.

It has to be remembered that the board have nowhere stated directly their reasons for making this order. It seems tolerably clear from such evidence as there is that if the applicant company had been willing to adopt any one of the three methods set out in the board's circular the order would never have been made because, of course, the necessity for, or the desirability of, such an order being made would then not have arisen. This of itself does not, I think, necessarily lead to the inference that the order was made to enforce a policy or to punish the company. Their refusal to adopt any of the three methods brought about the situation in which the order was made, but the whole of the facts of that situation must, I think, be considered before any inference can be drawn. For example, and just for example, the board may have taken the view that s. 43 gave them the power on the facts of this case to make the order in any event, and if they were right in that view and they did, in fact possess the power, the precise motives with which they did it would not be material and would not be a matter for the court to inquire into, the good faith of the board and of the Minister not being in question. They may have taken the view that as a governing principle, which I have cited from para. 1 of the schedule to the regulations of 1948, if the assessment of development charges was to procure the sale of land at existing use prices, their functions under the Act were concerned with the sales of land at existing use prices and their compulsory powers under the Act were to comprehend that matter however the section was construed.

Sheffield Corporation had expressed the view to the Central Land Board that the site in Whirlow Lane should be made immediately available for housing development in the public interest. Planning permission had been given to Rodgers to build a house on the land in 1948. Rodgers had asked the board to assist him by exercising their powers under s. 43 when it appeared that the applicant company were asking a price which represented more than the existing use value. The view of the board was evidently that the approved development might be hindered if not prevented unless the land were made available. All these matters may, as I say by way of example, have been in the mind of the board. It seems reasonable to suppose that the board would never have issued their circular "House 1" unless they had wished to see the advice in it carried out in practice, but I do not think that the whole of the evidence, considered dispassionately, would justify me in drawing the inference that the order was made in order to punish the company. It is difficult to resist the conclusion that one of the purposes in making the order was to enforce the view they held that it was desirable that land should only be sold at existing use value. To come to any other conclusion would be, I think, to ignore the true meaning of the correspondence. It is clear, I think, that the board viewed the company's terms in the proposed transaction with Rodgers with great disfavour because they felt it to be in opposition to what they had expressed as being fair and reasonable in the new situation created by the Act of 1947. They had before them the expressed view of Sheffield Corporation that it was in the public interest that this site should be made immediately available for housing development, and the proposals of the company were likely to prevent or to impede that.

Rodgers, to whom permission to build a house had been granted, was unwilling to accept the company's terms and had appealed to the board for assistance. They had themselves been unable to acquire the land in question on what they regarded as reasonable terms; they therefore exercised their compulsory powers under the words in the latter part of s. 43, sub-s. 1, of the Act of 1947, and applied them to the exact facts of this case, to purchase compulsorily "for the purpose of disposing of "it for development for which permission has been granted under "Pt. III of this Act on terms inclusive of any development "charge payable under those provisions in respect of that "development" (s. 43, sub-s. 1).

I do not think that the evidence leads to the inevitable inference that the compulsory purchase order in this case was made solely to enforce the policy of the board as laid down in the advice given in the circular "House 1", but that it entered their consideration, as I have said, seems to admit of no doubt. In the absence, however, of any declaration of the board stating their precise reason for making the order, it would appear to be reasonable to suppose that many considerations may have determined the decision, of which this was one. Neither do I think that I should be justified on the evidence in drawing the inference that one of the considerations was to punish the company for their refusal to conform to the board's wishes.

It seems to me that the real question in this case is what were the powers of the Central Land Board under s. 43 of the Act of 1947? That section provides: "(1) The Central Land "Board may, with the approval of the Minister, by agreement "acquire land for any purpose connected with the performance "of their functions under the following provisions of this Act, "and in particular may so acquire any land for the purpose of "disposing of it for development for which permission has been "granted under Part III of this Act on terms inclusive of any "development charge payable under those provisions in respect "of that development". The latter words are almost the exact words of the resolution of the board, of the order and of the confirmation by the Minister.

By sub-s. 2: "If the Minister is satisfied that it is expedient "in the public interest that the board should acquire any land "for any such purpose as aforesaid, and that the board are "unable to acquire the land by agreement on reasonable terms, "he may authorise the board to acquire the land compulsorily in "accordance with the provisions of this section".

By sub-s. 4: "Any land acquired by the Central Land Board "under the provisions of this section shall be disposed of by "them in accordance with such directions as may be given to "them in that behalf by the Minister, and until the land is so "disposed of the board may manage it in accordance with such "directions".

Under this section, therefore, the board may be authorized by the Minister to acquire any land compulsorily for any purpose connected with the performance of their functions under the subsequent provisions of the Act if the Minister is satisfied that it is expedient in the public interest.

Of the subsequent provisions of this Act of Parliament concerning this matter the most important appear to be s. 61, relating to the ascertainment of development values, and s. 70, relating to the fixing of development charge and the regulations made under it. Under the first part of s. 43, sub-s. 1, the board could exercise their compulsory powers in suitable cases to test the market prices, to assist them in ascertaining development values and in fixing development charges and in collecting information necessary for these purposes. But in view of the second part of the sub-section, which is the part which has been followed by the order in this case, I cannot think that the powers of the board to make a compulsory purchase order are confined strictly to those matters.

Let me take a purely hypothetical case: there is a plot of land in a particular neighbourhood which happens to be the only plot available and suitable for the erection of a new building which some individual desires to erect for public purposes and in the public interest, such as a memorial hall or a library or some institution of that kind. The landowner, recognizing the strength of his position, holds out for a price which is utterly unreasonable. In these circumstances the individual appeals to the Central Land Board to assist him by the use of their compulsory powers under

s. 43, for he himself cannot acquire suitable land at all or at a reasonable price. For myself I think that the board would then have power under s. 43 to exercise their compulsory powers to assist in the accomplishment of this particular development notwithstanding that it should happen to be fully in accord with views they had previously expressed as to the proper administration of the Act and of the desirable course to be taken.

With regard to the second part of s. 43, sub-s. 1, which I have read, it was said by Mr. Hill that it must be read in conjunction with the first part of the sub-section and that everything was governed by the words " for any purpose connected with the " performance of their functions " under the subsequent provisions of the Act, whereas the Attorney-General contended that it was a separate and independent power.

Counsel are unable to help me with any authorities on the use of the words " in particular " which appear in s. 43, sub-s. 1. These words, of course, are not " for example " or " and also ", and the use of those words has created a considerable difficulty in my own mind. " Acquire land for any purpose connected " with the performance of their functions under the following " provisions of this Act, and in particular " this you may do as one of those functions. I suppose it is possible, reading English in its ordinary way, to read the sub-section as stating: " the " performance of their functions under the following provisions " of this Act, and in particular, and this is an example of what " you may do . . .". But, as I say, there are no authorities upon the matter, as I understand it.

Mr. Hill suggests that those words " in particular " are really particularizing one of the things which in exercise of their functions the board may do, their functions being covered by the subsequent provisions of the Act, and that is to acquire and dispose of land, to assist them in their functions of ascertaining development values and assessing development charges and not otherwise.

The Attorney-General said that this power was not to be restricted in that way; that this was a separate power to be exercised in particular cases subject to the Minister's certifying that he was satisfied that it was expedient in the public interest for it to be done. He said that the particular purpose in the second part of s. 43, sub-s. 1, which is introduced by the words " in particular ", enlarged the general powers given under the first part of the sub-section; or, alternatively, he said that the words " in particular " meant that this was an instance of the general performance of the powers conferred on the Central Land Board.

The matter, of course, is not free from doubt and I have not yet, I am afraid, reached that stage when I can deliver a view

1950

EARL FITZWILLIAM'S WENTWORTH ESTATES CO. v. MINISTER OF TOWN AND COUNTRY PLANNING.

Birkett, J.

about the construction of a statute and feel that it must be right. But, having given to it the very best consideration that I can—and I confess freely that it has been a matter of considerable difficulty, because this was an unchartered field in a very difficult part of the law of town and country planning—I have come to the conclusion as a matter of construction that the inclusion of these words in the second part of s. 43, sub-s. 1, was not intended to confine the Central Land Board in the exercise of their compulsory powers of purchase to cases which bear directly and solely on the ascertainment of development charges or the development values for the assessment of them, but are wide enough to allow them to do what they have done in this case, that is to acquire the land of the company for the purpose of disposing of it for development for which permission has been granted under Pt. III of the Act on terms inclusive of any development charge payable under these provisions in respect of that development.

In these circumstances, holding as I do, that the power so to act is conferred on the Central Land Board in the circumstances of this case, the Minister having certified that he is satisfied that it is expedient in the public interest that the board should acquire the land in question and that the board were unable to acquire the land by agreement on reasonable terms, I have come to the conclusion that the order was properly made and that it is not open to me to interfere with it. The motion must therefore be dismissed.

Motion dismissed.

Solicitors: *Warren, Murton & Co. for Newman & Bond, Barnsley; Treasury Solicitor.*

L. F. J. McD.

NOEMIJULIA STEAMSHIP CO. LD. *v.* MINISTER OF FOOD.

1950
Mar. 21, 22;
April 5.

Devlin, J.

C. A.

1950
July 10, 11, 12, 17, 24.

Tucker, Cohen and Asquith, L.JJ.

Shipping—Charterparty—"Full reach and burthen of the steamer "including 'tween and shelter decks, bridges, poop, etc. (provided "same are not occupied by bunker coals . . .)"—Construction—Charterer's option to cancel charterparty if vessel not ready to load by specified date—Bunker coal in number 3 lower hold and number 3 'tween deck at cancelling date—Absence of mainmast and after derricks—Readiness to load.

By a charterparty dated October 15, 1948, a steamship was required to go to certain Argentine ports and there load a cargo of grain in bags or bulk. Under the terms of the charterparty the cargo was to be brought to and taken from alongside at charterer's risk and expense, and the charterer had the option of cancelling the charter if the steamer should not be ready to load at the first loading port by a specified time. By cl. 6 the charterer was granted the "full reach and burthen of the steamer including "'tween and shelter decks, bridges, poop, etc. (provided same "are not occupied by bunker coals and/or stores)". The vessel reached the first loading port before the specified time and gave notice of her readiness to load, whereupon the charterer cancelled the charterparty on the ground that she was not then ready to load. In an arbitration the umpire found, subject to the decision of the court on a stated case, that the steamer was in two respects unready to load at the specified time: her number 3 lower hold contained some bunker coal; and she had no mainmast or after derricks.

Held, (1.) that cl. 6 only gave the charterer the right to use cargo space in the ordinary meaning of that term; that, in order to claim that a reserve bunker space should be made available to him for cargo, a charterer must at least establish that the space could not reasonably be required for bunkers to be used on the voyage; and that, as the charterer had not established that on the facts, number 3 lower hold of the vessel was not a part of the ship which the owner had to make ready for loading.

(2.) That as the loading gear, as contrasted with the cargo space, had not got to be placed at the disposal of the charterer, and he had no rights with regard to it, save in so far as it was necessary to enable the shipowner to perform his contractual obligations under the charterparty, and it was a matter for the shipowner to decide by what means he would carry out those obligations, the charterer must prove that at the date of cancellation the ship was in such a condition that the shipowner must necessarily—not might—be unable to comply with his obligation to load such cargo as the charterer was entitled to call on him to take on board at the first or some subsequent port; and the charterer had failed to prove this.

SPECIAL CASE stated by an umpire.

By a charterparty dated October 15, 1948, made in London between the Noemijulia Steamship Co. Ld. as shipowners and the

1950

NOEMIJULIA STEAMSHIP CO. LD. *v.* MINISTER OF FOOD.

Minister of Food as charterer, the steamship *San George* was required to go to certain Argentine ports and there load a cargo of grain in bags or bulk. Clause 17 stipulated that the cargo was to be brought to and taken from alongside at charterer's risk and expense, and cl. 12 gave the charterer the option of cancelling the charter if the steamer should not be ready to load at the first loading port by 6 p.m. on December 27, 1948. By cl. 6: "The "charterers are to have the full reach and burthen of the steamer "including 'tween and shelter decks, bridges, poop, etc. (provided same are not occupied by bunker coals and/or stores)". By cl. 19: "Owners undertake that the steamer shall not load "more than 7,350 tons, and not less than 6,650 tons English "weight . . .".

At 2.30 a.m. on December 27, 1948, the *San George* reached San Lorenzo, the first loading port, and gave notice of readiness to load. The charterers cancelled the charterparty on the ground that the steamer was not ready to load in that (1.) there were ten tons of bunker coal in number 3 lower hold and a few tons in number 3 'tween deck; and (2.) she had no mainmast or after derricks.

The umpire, who found as a fact that both number 3 'tween deck and number 3 lower hold were designed as a reserve bunker space and were capable of carrying cargo if not used as reserve bunkers, held that the vessel was not ready to load at the material time, and refused the shipowners' claim for damages for wrongful repudiation of the charterparty.

Sir Robert Aske, K.C., and *E. W. Roskill* for the shipowners.
Mocatta for the charterer.

Cur. adv. vult.

April 5. DEVLIN, J., read the following judgment: The question which the court has to determine is whether on the facts set out in this case the charterer was entitled to cancel the charterparty. He claimed to do so on the ground that the ship, which was required under her voyage charter to load a cargo of grain in bags or bulk, beginning at San Lorenzo as the first loading port, was not ready to load by 6 p.m. on December 27, 1948, the time specified in the cancelling clause. The umpire has held that she was not then ready to load in two respects. First, her number 3 'tween deck and number 3 lower hold contained bunker coal; there were about ten tons in the latter. Secondly, she had no mainmast or after derricks. There is not much direct authority on either point; but I have had the advantage, which the umpire apparently did not have, of legal argument on the principles involved.

On the first point Sir Robert Aske, for the shipowners, accepts as a general proposition the statement of principle which is taken from the judgment of Lopes, J., in *Groves, Maclean & Co.* v. *Volkart Brothers* (1), and set out in Scrutton on Charterparties (15th ed.), p. 141, that the ship " must be completely ready in " all her holds so as to afford the charterer complete control of " every portion of the ship available for cargo ". His first point is that number 3 lower hold was not a part of the ship available for cargo nor a part in which the charterer had the right under the charterparty to load cargo. The umpire finds that both number 3 'tween deck and number 3 lower hold were designed as a reserve bunker space; and adds that if not used as reserve bunkers they are capable of carrying cargo. The argument has not been much concerned with the 'tween deck, since it appears that on any view it would be needed for bunkers. The charterer's rights under the charterparty are contained in cl. 6, which provides that he is " to have the full reach and burthen of the " steamer including 'tween and shelter decks, bridges, poop, etc. " (provided same are not occupied by bunker coals and/or " stores)". These words are not intended to include anything that is not cargo space in the ordinary acceptation of that term: see *Louis Dreyfus & Co.* v. *National Steamship Co. Ld.* (2). Sir Robert Aske argues that even if the reserve bunker space in number 3 lower hold is properly described as cargo space, it is excluded by the proviso to this clause, since it was in fact occupied by bunker coals. Mr. Mocatta on behalf of the charterer argues that number 3 lower hold is within the full reach and burthen of the steamer, and that the proviso does not apply since on its true construction it is restricted to 'tween and shelter decks, bridges, poop, etc., which items do not include number 3 lower hold. I do not agree with this construction of the proviso, and I think that in any event it is rendered ineffective by the presence of the word " etc.". That word must bring in at the least other parts of the ship similar to 'tween and shelter decks, bridges and poop. The only general description which can be given of these spaces is that given by Branson, J., in *Louis Dreyfus & Co.* v. *National Steamship Co. Ld.* (2), namely, that they are " spaces which might in the ordinary course be used for " bunker coals and/or stores ". A reserve bunker space certainly comes under that description. It would indeed be curious if the proviso applied to all the 'tween decks and to such places as bridges and poop, while excluding a space specially designed as a reserve bunker space.

I am inclined to think that it is sufficient to sustain Sir Robert Aske's point that the primary use of number 3 lower hold was for bunkers and that bunkers were in fact in it. But if

(1) (1884) C. & E. 309.

(2) [1935] 2 K. B. 313, 319.

number 3 lower hold is treated as ordinary cargo space, then, counsel concedes, the proviso must be read with an implied limitation to bunkers and stores reasonably required for the voyage: it would not be permissible for the owner to rob the charterer of ordinary cargo space by taking an unlimited supply of bunkers: see *Darling* v. *Raeburn* (3). The umpire has found that in order to reach the nearest bunkering station with a safe margin the vessel would require 130 tons over her permanent bunker capacity; but that this could be carried in the number 3 'tween deck, leaving number 3 lower hold free for grain. Sir Robert Aske contends, and I did not understand Mr. Mocatta to dispute, that the nearest bunkering station is not for this purpose the test, and that under *Darling* v. *Raeburn* (3) the ship can properly carry the bunkers required for the whole voyage. There is no evidence of what this quantity would be.

I hold that under cl. 6 a charterer who contends that a reserve bunker space should be made available to him for cargo is bound to establish at least that the space could not reasonably be required for bunkers to be used on the voyage. On the facts in this case I therefore hold that number 3 lower hold was not a part of the ship which the owner had to make ready for loading.

I should not, however, leave this point without referring to cl. 19, which provides: "Owners undertake that the steamer "shall not load more than 7,350 tons, and not less than 6,650 "tons". This type of clause was considered by Hamilton, J., in *Jardine, Matheson & Co.* v. *Clyde Shipping Co.* (4). It is, I think, a warranty by the owner that he will not ask for more than 7,350 tons and that the ship can take at least 6,650 tons; but it neither enlarges nor curtails the charterer's rights under cl. 6. If the space available under cl. 6 is not sufficient to take 6,650 tons, the owner will be liable for whatever may be the appropriate consequences of his breach of undertaking, but the cargo could not overflow into spaces of which the charter did not grant the use. Although these clauses are thus distinct, every clause must be construed with reference to its fellows. If cl. 6 is clear, there is no more to be said, even though it be established as a fact that without the use of number 3 lower hold 6,650 tons could not be loaded. But if the meaning of cl. 6 is doubtful and that fact were established, it would, I think, be a material fact to be considered in the construction of cl. 6.

The umpire has found that the ship might not be able to take 6,650 tons without the use of number 3 lower hold: it would depend on the stowage factor, i.e., the number of cubic feet to the ton. Sir Robert Aske suggests that there is a miscalculation in this paragraph, and that the capacity plan, which is attached

---

(3) [1907] 1 K. B. 846.

(4) [1910] 1 K. B. 627, 630.

1950

NOEMIJULIA STEAMSHIP CO. LTD. v. MINISTER OF FOOD.

Devlin, J.

to the award, shows that even at the highest stowage factor the minimum cargo could be loaded without the use of number 3 lower hold. Mr. Mocatta agrees that there appears to be a discrepancy between the calculation and the capacity plan. I cannot amend or disregard the calculation except by consent. There may have been matters known to the umpire which would justify it. Neither side asked for the case to be remitted, and I am not myself of the opinion that the point is of sufficient importance to be remitted. If the calculation was confirmed, the effect of it would still be uncertain because the stowage factor is unknown; and there would not, therefore, be forthcoming any clear fact to aid in the construction of cl. 6.

The second point I find much more difficult. The lack of mainmast and after derricks meant a deficiency in the ship's gear which might have interfered with the loading of numbers 4 and 5 holds. The extent of the possible interference is dependent on the method of loading and is detailed in the case. The authorities on readiness to load mostly deal with the condition of the holds. But it was not disputed that the principle in some form must be applied to the ship's gear, where it has to be used; for it would be pointless to insist on the space being available if the ship was in no condition to play her part in filling it; but it does not follow that the principle is to be applied with the same stringency. It is obvious that sooner or later all the space in which cargo is to be loaded must be emptied and made fit to receive the cargo; and so there is good business sense in saying that it should be done sooner rather than later. It would be unsatisfactory if the work of making ready had to be chased by the work of loading; the shipper wants to know that all is in readiness before he begins, and it is best to make a firm rule.

The ship's gear is different: some of it may not be required at all; some of it may not be needed until an advanced stage of the loading and the keeping of it in constant readiness from the first moment to the last may involve labour and expense unnecessarily. *Vaughan* v. *Campbell Heatley & Co.* (5), *The Grampian S.S. Co. Ld.* v. *Carver & Co.* (6), and *Armement Adolf Deppe* v. *John Robinson & Co. Ld.* (7) have been cited; and, though none is directly in point, each in its own way shows, I think, that, outside the clear rule about the condition of the holds, some elasticity is permissible. In particular Swinfen Eady, L.J., in *Armement Adolf Deppe* v. *John Robinson & Co. Ld.* (7), lays down the test of readiness in a business and mercantile sense and deprecates the idle formality of incurring useless expense. Apart from useless expense, I find it hard to believe that if, for

---

(5) (1885) 2 T. L. R. 33.
(6) (1893) 9 T. L. R. 210.
(7) [1917] 2 K. B. 204, 208.

1950

NOEMIJULIA STEAMSHIP CO. LD. v. MINISTER OF FOOD.

Devlin, J.

example, a winch which would not be needed for some days after the loading began, required an hour or two's overhaul, the cancellation of the charter would be justified. Examples of this sort could be multiplied, and would serve to show that a test which produces a sensible result in the case of the holds may not work equally well in respect to gear. It must always be remembered that this is a forfeiture clause and so not to be applied lightly. It would be a misfortune, I think, if defects of no real significance in the adventure were to be used as a means of throwing up a charter at the last moment.

I have not here to consider a charterparty which expressly gives to the charterer the right to use any part of the ship's gear: in such a case it might well be argued that all such gear must be in readiness. Nor have I to consider a charterparty which prescribes any particular method of loading or allows the charterer to select a method; in such a case it might be argued that any ship's gear required for such method must be in readiness. All that the charterparty says in cl. 17 is that the cargo is to be brought to and taken from alongside at charterer's risk and expense. It is therefore the duty of the ship to remove the cargo from alongside and load it.

Sir Robert Aske argues that the way in which it is loaded from alongside and the sort of gear that is used for the loading is no concern of the charterer provided, presumably, that it is done expeditiously. It is difficult to fit into the conception of "along-" side" the methods of loading grain in bulk that are described in the case—by chute, belt conveyor or elevator. There was no evidence which of these methods would have been used, nor does the case state who would have been responsible for operating them. There is nothing to show that the charterer is entitled to impose any one of these methods on the owner. I think that the highest the charterer can put his case is to say that he is entitled to the reasonable co-operation of the owner in selecting and working the most convenient method. What that involves in relation to the ship's gear can best be illustrated by the loading of bulk grain. Of the three methods which I have mentioned none required the use of the ship's gear. But if the elevator had been used its tube would have required support normally afforded by the mainmast. That does not mean, in my judgment, that the charterer is entitled as of right to an easement of support. It means at the highest that if he notifies the master that he wants to load by that particular method, he is entitled to the reasonable co-operation of the master in getting the necessary support. In the absence of the mainmast, a jury-rig could have been erected. I do not think that a state of readiness requires that a jury-rig should have been permanently erected from December 27 onwards on the chance that one of several possible methods of loading at one of several possible loading ports might have required it; that would, I think, be an idle formality and a useless expense.

I have dealt with the loading of grain in bulk. As it was the charterer's option to load either in bulk or in bags I think that the ship should be ready for either. For the loading of bags the ship's gear would not be required at all, except at a subsequent port below the bar when it might have been needed as an alternative to a shore crane if the cargo was loaded from lighters; and I suppose that this might have involved numbers 4 and 5 holds. I do not think that the ship is proved to be unready in the business sense because of the possibility of her not being able to meet this somewhat remote contingency.

In my judgment, a charterer who cancels on the ground that the ship's gear is defective must (in the absence of express or implied provisions about the gear) show that the defects were such that the ship would probably be unready when the time came to play her part in the agreed method of loading, if any, or in giving the necessary co-operation in any reasonable method that might be employed. I do not think that the case discloses sufficient evidence of unreadiness in this sense; accordingly I hold that the charterer was not entitled to cancel the charterparty and I uphold the award of 19,607*l*. 6*s*. 1*d*. in favour of the shipowners.

I should add that I have not found it necessary to consider, except incidentally, an interesting submission made by Sir Robert Aske that, where there is more than one loading port, readiness to load means readiness to carry out the work at the place where the notice of readiness is given, and does not involve readiness for work at any subsequent port.

S. C.

The charterer appealed.

Scott Cairns, K.C., *Mocatta* and *M. R. Holman* for the charterer. In order that a ship may be "ready to load" she must be ready for the full operation of loading. All the cargo space to which the charterer is entitled must be empty and all the equipment which may be necessary in the course of loading operations must be available.

[TUCKER, L.J. Has the ship to be ready to deal with every contingency that might arise under the charterparty, although in fact it was not going to arise?]

It is submitted, yes. But it is not necessary to go so far. It is plain upon the authorities that the rule requiring the holds to be empty is a rigid one: see *Groves, Maclean & Co.* v. *Volkart Bros.* (8), *Lyderhorn Sailing Ship Co.* v. *Duncan Fox & Co.* (9),

(8) (1884) C. & E. 309.

(9) [1909] 2 K. B. 929.

Sun Shipping Co. Ld. v. *Watson and Youell Shipping Agency* (10), and *London Traders' Shipping Co.* v. *General Mercantile Shipping Co.* (11). Those cases establish the general principle that the readiness of the ship involves the whole of the cargo space being ready to load by the cancelling date.

It is, of course, clear, as was held by the judge, that what the shipowner has to have empty is the cargo space, and no more than that. The judge relied on *Louis Dreyfus & Co.* v. *National Steamship Co. Ld.* (12), and took the view that the proviso governed the whole of the words of cl. 6 which preceded it. It is submitted that number 3 lower hold is within the full reach and burthen of the steamer, and that the proviso does not apply to it, since on its true construction the proviso is restricted to " 'tween " and shelter decks, bridges, poop, etc.", which items do not include number 3 lower hold. It would be remarkable if number 3 lower hold were so included. Number 3 lower hold being part of the full reach and burthen of the vessel, the shipowners were not entitled to use it for bunker coal. *Darling* v. *Raeburn* (13) is authority for the proposition that the bunker coal which a shipowner is entitled to have on his ship must not exceed what is required to take the vessel to the end of her voyage, with sufficient to carry her beyond to another coaling port if necessary. It is not authority for the proposition that the shipowner is entitled to put on his ship as much bunker coal as may be necessary to take the ship to the end of the chartered voyage, however long that voyage may be. The warranty to be implied is that the shipowner will not carry more coal than will render the ship seaworthy for the next voyage or the next stage of the voyage.

[ASQUITH, L.J. Why should the principle laid down in *Darling* v. *Raeburn* (14) with regard to two separate voyages apply to this case, where there are two stages of one voyage and one is optional?]

Because the shipowner is granting to the charterer the full cargo capacity of the ship, except that which is necessary for bunkers, and it is unnecessary to carry bunkers for the whole voyage if the ship can rebunker on the way.

[ASQUITH, L.J. Having reserved liberty to call at a bunkering station, you say they were bound to exercise it?]

Yes. The shipowner cannot bring within the term " necessary " bunkers which are unnecessary if he divides the voyage into stages.

If the shipowner is entitled to take bunker coal for the whole of the voyage then the umpire has not found what quantity of

(10) (1926) 42 T. L. R. 240.
(11) (1914) 30 T. L. R. 493.
(12) [1935] 2 K. B. 313, 319.
(13) [1907] 1 K. B. 846.
(14) Ibid.

coal would be required for the whole voyage and it is not possible, looking at his award, to say whether that would necessitate encroachment upon the number 3 lower hold.

As for the question of equipment, the charterer relies on the decision in *Sun Shipping Co.* v. *Watson and Youell Shipping Agency* (15). A ship cannot be said to be ready to load at the cancelling date unless she has available equipment which may in the ordinary course of events be necessary for handling the cargo. Devlin, J.'s, decision proceeds on the basis that a less stringent rule applies in the case of equipment than applies in regard to cargo space. There is no ground for drawing that distinction, and the cases cited by the judge do not support it. If in the circumstances of the case the charterer can reasonably say that there is a possibility that certain gear might be required, he is entitled to have it available at the cancelling time.

Sir Robert Aske, K.C., and *E. W. Roskill* for the shipowners. With regard to the question of gear, the onus is on the charterer to satisfy the court that this vessel was not ready to load. In order to do that in the circumstances of the present case he has to put his rights under the cancelling clause far beyond any point to which, up to the present, they have been taken by judicial decisions. He has not established such elementary matters as the kind of cargo he intended to load, in what form it would be shipped, and in what way he intended to bring it to the vessel. Therefore there is nothing on the face of the special case which shows that if the charterer had proceeded with the work of loading the cargo would not have been taken on board the ship at all the loading ports. Unless it is established to the satisfaction of the court, by evidence disclosed in the special case, that the vessel would not have loaded in the ordinary course if the charterer had performed his part of the contract, the charterer has failed to show that the loading would not have proceeded without let or hindrance. There is no onus on the shipowners to prove that the vessel is ready to load.

The forfeiture clause is one of great antiquity, and it is not to be extended. Otherwise, where is the obligation of the shipowner to begin and end under a charterparty which gives the charterer an option to load a variety of cargoes? Different cargoes require different equipment, such as dunnage, shorings, shifting boards and separations. Is the charterparty to be liable to cancellation unless the ship is provided with all these different gears and equipments? From the business point of view it would be preposterous to expect a shipowner to go to the expense of providing all sorts of equipment for many varieties of cargo. Unless the charterer shows that the nature of the cargo and the

---

(15) 42 T. L. R. 240.

C. A.
1950

NOEMIJULIA STEAMSHIP CO. LD. *v.* MINISTER OF FOOD.

way in which he intends to load it involve the use of the ship's gear the question of equipment does not come into the picture at all. Readiness to load means readiness to load at the first port, and it is immaterial if the equipment of the ship is not ready at a subsequent port. Gear is of no use without men to work it, and the argument of the charterer involves that shore labour must be kept idle, waiting in case they are required. It is the duty of the charterer to inform the master what is required.

As for the hold, the onus is on the charterer to satisfy the court that he is entitled to have cargo loaded into number 3 lower hold. The charterer contends that the word " etcetera ", following " 'tween and shelter decks, bridges, poop ", involves the application of the ejusdem generis rule. It is submitted that that contention is not sound: see *Ambatielos* v. *Anton Jurgens Margarine Works* (16). A charterer who contends that a reserve bunker space should be made available to him for cargo must establish at least that the space could not reasonably be required for bunkers to be used on the voyage. It is really a question of what bunker coal it is reasonable to carry. A shipowner cannot be said to be acting unreasonably if he carries no more than are sufficient to fill all the bunker space, including reserve bunker space, appearing on the capacity plan of the vessel. The option to coal in stages on the voyage is given to the shipowner and not to the charterer, and if the master chooses to do so he cannot depart from those stages. Here, if the master, not having elected to bunker at St. Vincent, had not carried sufficient coal for the whole voyage, his ship would have been unseaworthy. The contention that the vessel should have carried only sufficient bunker coal to take her to St. Vincent would turn what was merely a permission into an obligation.

[*Darling* v. *Raeburn* (17), *Grampian S.S. Co.* v. *Carver & Co.* (18), *The Vortigern* (19), *Northumbrian Shipping Co. Ld.* v. *E. Timm & Son Ld.* (20), and *The Moorcock* (21) were also referred to.]

Cur. adv. vult.

July 24. The following judgments were read:—

TUCKER, L.J. [after referring to the facts]: With regard to the presence of bunker coal, the question largely depends upon the proper construction of cl. 6 of the charterparty, which reads as follows: " Charterers have the option of shipping other lawful " merchandise, cotton, sugar, quebracho wood, quebracho " extract, and distillery residue excluded. The Charterers are to

(16) [1923] A. C. 175.
(17) [1907] 1 K. B. 846, 851
(18) (1893) 9 T. L. R. 210.
(19) [1899] P. 140, 155.
(20) [1939] A. C. 397.
(21) (1888) 14 P. D. 64.

"have the full reach and burthen of the steamer including 'tween "and shelter decks, bridges, poop, etc. (provided same are not "occupied by bunker coals and/or stores)". The umpire has found that both number 3 'tween deck and number 3 lower hold were designed as reserve bunker space, but that if not used for this purpose are capable of carrying cargo. The question at issue really concerns number 3 lower hold, as there was no evidence that on any view number 3 'tween deck was not reasonably required for bunkers. So far as cargo carrying holds are concerned, it is, I think, well settled that, as stated in *Groves, Maclean & Co.* v. *Volkart Bros.* (22), "A ship to be "ready to load must be completely ready in all her holds . . . "so as to afford the merchant complete control of every portion "of the ship available for cargo". The argument for the charterer was that number 3 lower hold is within the full reach and burthen of the steamer and that the proviso does not apply since it is confined to 'tween decks, shelter decks, bridges, poops, etc., which items do not include number 3 lower hold. On this the judge said (23): "Mr. Mocatta argues that number 3 lower hold "is within the full reach and burthen of the steamer, and that "the proviso does not apply, since on its true construction it is "restricted to 'tween and shelter decks, bridges, poop, etc., which "items do not include number 3 lower hold. I do not agree "with this construction of the proviso, and I think that in any "event it is rendered ineffective by the presence of the word "'etc.'. That word must bring in at least other parts of the "ship similar to 'tween and shelter decks, bridges and poop. "The only general description which can be given of these spaces "is that given by Branson, J., in the case to which I have "referred"—that was *Louis Dreyfus* v. *National Steamship Co.* (24)—"namely, that they are 'spaces which might in the "'ordinary course be used for bunker coals and/or stores'. A "reserve bunker space certainly comes under that description. "It would, indeed, be curious if the proviso applied to all "the 'tween decks and to such places as bridges and poop, while "excluding a space specially designed as a reserve bunker "space".

I agree with this construction. The word "including" is, I think, intended to embrace the enumerated spaces which follow within the ambit of the full reach and burthen of the ship, which expression, standing alone, is ambiguous and might be read as excluding or including the enumerated spaces. The word "same" must, I think, from its position, refer either to the full reach and burthen plus the enumerated spaces or to the enumerated spaces alone. If it refers to both, number 3 lower hold is clearly covered under one head or the other. If it refers only to the enumerated spaces, then I think number 3 lower hold is included in " etc.", which is an expression apt for including in the spaces enumerated space sometimes used for cargo but often also used for reserve bunker coal and denominated in the capacity plan as " No. 3 reserve ".

---

(22) (1884) C. & E. 309.

(23) Ante, p. 225.

(24) [1935] 2 K. B. 313.

On this construction, and assuming that number 3 lower hold is to be treated primarily as cargo space, the question arises whether the presence of coal was reasonably required for the voyage. As to this, the judge has held that the onus is upon the charterer, who seeks to cancel, to show that it was not reasonably required for the whole voyage, and that he does not discharge this burden by showing that the quantity was in excess of that which was required to reach the first available coaling port at which he had liberty to call on the voyage. It was contended by the charterer that the judge had erred in placing the onus on him and that once the presence of coal was established in a part of the vessel not exclusively appropriated to bunkers, the onus shifted to the shipowners to justify its presence. No authority for this proposition was cited to us, and it seems to me to be contrary to the principle that he who seeks to enforce a forfeiture clause, which in effect this is, must strictly prove the existence of all the matters upon which he relies as justification of his conduct, and in my view Devlin, J., rightly placed the onus upon him. Furthermore, I think that the right test is what is required for the whole voyage. It is true that it has been decided that the shipowner is not in breach of the warranty of seaworthiness if the master has elected to divide his voyage into stages for coaling purposes and only carries sufficient coal to carry the vessel on its first stage: see *The Vortigern* (25). But this doctrine is in relief of the shipowner's liability under his warranty that the ship is seaworthy for the whole of the charter voyage, and cannot in my view be used as imposing upon him an obligation, at any rate in the absence of any election on his part so to do, to bunker in stages. For these reasons I agree with the conclusion of the learned judge on this part of the case.

The second question is, I think—as Devlin, J., said—more difficult. The duty to load was by the charterparty on the shipowners, the charterer being required to bring the cargo alongside at his risk and expense. The charterer had the option to load in bags. The case finds that after loading at the up-river ports, which could have been carried out without the ship's gear, namely, by means of elevator, chute or belt conveyor in case of bulk cargo, and by use of shore loading gear in the case of bags, the vessel not being able to cross the bar at Martin Garcia with

(25) [1899] P. 140.

a full cargo, would have had to complete the loading at ports below the bar, and such completion would have entailed the loading of some cargo in bags either by shore crane, if alongside, or by ship's gear from lighters in the river.

Owing to a fire which had occurred on board the *San George*, the vessel had lost her mainmast and the after derricks attached to it, and it had been decided to defer permanent repairs to the mast until the vessel's return to the United Kingdom. Consequently, she was unable to load by ship's gear into numbers 4 and 5 holds. As already indicated, this gear would only have been required in the event of the vessel not being able to obtain a berth in port below the bar and consequently being compelled to load from lighters. The case finds, at the end of para. 5 (ii) (*a*), as follows: " There was no evidence before me which method of " loading would have been used at San Lorenzo or elsewhere, or " to which other ports in the permitted range the vessel would " have been sent. Nor was there evidence before me whether " the mainmast could have been re-erected after loading at San " Lorenzo, with or without removing the part cargo, and, if so, " with what delay ". The concluding words are, I think, of first importance.

The judge decided that the charterer was not entitled to cancel for this reason on the ground that the rule as to readiness to load applicable to cargo space ought not to be so stringently applied in the case of gear required for loading and that on the facts found by the umpire the ship was not proved to be unready in the business sense because of the possibility of her not being able to meet this somewhat remote contingency. I have reached the same conclusion, though I would venture to express my view in slightly different language. It seems to me that there is a real distinction to be drawn between the cargo space and the gear. The charterer is entitled to the control of the whole of the cargo space from the outset of the voyage. His rights in this respect are stated in Halsbury's Laws of England, vol. 30, at p. 427, in these words: " The ship must be ready to load, that is to say, " the shipowner must be in a position to place the whole of the " chartered space at the charterer's disposal ".

The loading gear had not got to be placed at his disposal, and he had no rights with regard to it, save in so far as it was necessary to enable the shipowner to perform his contractual obligations under the charterparty. Provided that the shipowner was able when required to load any cargo which the charterer was entitled to tender to him alongside, it was a matter for him to decide by what means he would carry out his contractual obligations. I am unable to draw the distinction, for which Mr. Scott Cairns contends, between gear which is part of the ship's normal tackle and any other gear which may be required for what he calls " unusual cargoes ".

Counsel argues that the charterer is entitled to cancel if any of the " ordinary equipment " is not ready at the first loading port at the cancelling date, even if it will not be required at that port or at any subsequent port. Alternatively, he contends that it must be ready at the cancelling date if it *may* be required at some future date to deal with some cargo which the charterer is entitled to load. As regards equipment for what he calls an " unusual " cargo, he was, I think, inclined to concede that he might not be entitled to require that this should be ready in the absence of notice that it would be required.

On the other hand, Sir Robert Aske contended that the charterer was not entitled to cancel unless he proved what kind of cargo he intended to load, in what form it was to be (for example, in bags or bulk) and in what way he intended to bring his cargo to the vessel.

No authority relating to ship's gear was cited to us which supports to the full the contention of either side. In *Sun Shipping Co. Ld.* v. *Watson & Youell Shipping Agency Ld.* (26), there is nothing to show that the court was concerned with any cargo except grain in bulk. For this purpose shifting boards were required in the holds. They were not all in position at the first loading port. It was held that she was not ready to load for the purpose of calculating the lay days. It is to be observed that the charterers in their contentions had argued that there was a distinction between the degree of readiness to load for the purpose of lay days and the degree of readiness required for creating their right to cancel. The case is no authority for the proposition that if the shifting boards would not have been required until the vessel reached a later loading port the fact that they were not in position at the first loading port would have been a good ground for cancellation.

In *Vaughan* v. *Campbell Heatley & Co.* (27), the charterparty provided for shipment of a full and complete cargo of wheat and/or flour in bags and/or other lawful merchandise. The ship was not at the cancelling date lined in the manner usual and necessary for the protection of a wheat or flour cargo. The charterers cancelled, and it was held that they were not entitled to do so. The case is very briefly reported, but it appears that Lord Esher, M.R., based his judgment on the ground that the charterparty required the ship to be " ready " to load, not " fit " to load. Cotton and Lindley, L.JJ., however, added that the charterparty left it open to the charterers to load any kind of cargo and that many kinds of cargo would not require the ship

(26) 42 T. L. R. 240.

(27) 2 T. L. R. 33.

to be lined. There was no evidence as to what kind of cargo it was intended to load, but the additional ground on which the Lords Justices based their decision negatives the idea that so far as equipment is concerned the shipowner has got to be ready from the outset to deal with any kind of cargo which the charterer is entitled under the charterparty to call upon him to take on board. In *Grampian Steamship Co. Ld.* v. *Carver & Co.* (28), the charterparty required the shipowner to provide the necessary mats for a cargo of cotton seed, wheat, beans, maize or other grain. Day, J., decided that it was not obligatory on the shipowners to have the mats laid down in order to be ready to load, but it was sufficient if they had the mats ready to lay if required and that the charterers were not entitled to cancel.

In *Armement Adolf Deppe* v. *John Robinson & Co. Ld.* (29), on the question of readiness to discharge, Swinfen Eady, L.J., said: "It is the duty of the merchants to co-operate with the "owners in the receipt of cargo, and upon the facts I am satisfied "that the only reason why the ship did not take on board the "gang and rig the gear to fulfil the owners' duty in discharging "was that the receivers were not desirous of receiving the cargo "at the buoys, and so were not willing to co-operate in her "discharge there and made no preparations for doing so. The "ship was lying at a waiting berth, her voyage being ended; it "would have been an idle form to take on board men and open "hatches and make other preparations at the buoys when there "was no desire or intention of the merchants to receive cargo "until the ship was berthed at the quay. The ship was ready "to discharge in a business and mercantile sense, and the idle "formality of incurring useless expense was not necessary as a "condition precedent to the commencement of the lay days". These observations are, I think, equally applicable to a case where the charterer is seeking to justify a cancellation on the ground of unreadiness to load.

In this state of the authorities, I am of opinion that in principle a charterer who has cancelled on the ground of unreadiness to load by reason of the insufficiency of the loading gear, in a case where the obligation to load is on the shipowner and where there is more than one port of loading and different kinds of cargo which may be loaded at the option of the charterer, must at least prove that at the cancelling date the ship was in such a condition that the shipowner would necessarily be unable to comply with his obligation to load some cargo which the charterer was entitled under the charterparty to call upon him to take on board at the first or some subsequent port. It is, in my view,

---

(28) 9 T. L. R. 210.

(29) [1917] 2 K. B. 204, 207.

C. A.
1950

NORMIJULIA STEAMSHIP CO. LD. v. MINISTER OF FOOD.

Tucker L.J

not enough for him to show that at the cancelling date the shipowner *may* be unable to load some particular cargo; he must prove that he could not do so. In the present case the charterer failed so to do. There is nothing in the facts found by the umpire to indicate that the shipowner could not have devised some temporary equipment to take bags on board from lighters in the unlikely event of his being required to load in this manner.

For these reasons, I agree with the judgment of Devlin, J., and would dismiss this appeal.

COHEN, L.J. (read by Asquith, L.J.). I am of the same opinion. The charterer seeks to justify his notice of cancellation on two grounds: (1.) the fact that bunker coal was at the material time to be found in number 3 'tween deck and number 3 lower hold; and (2.) the fact that at the material time the mainmast was cut away and two wooden derricks dismantled and out of use. I do not desire to add anything to the reasons given by my brother Tucker for thinking that Devlin, J., reached the right conclusion on the first point.

I also agree with what my brother said on the second point, but as, like Devlin, J., I find it more difficult, I will state shortly in my own language my reasons for my conclusions.

Mr. Scott Cairns urged that there was no difference in principle between the requirements as to cargo space and those as to ship's gear. The authorities establish that "the ship" must be completely ready in all her holds so as to afford the charterer complete control of every portion of the ship available for cargo: see *Groves, Maclean & Co.* v. *Volkart Bros.* (30). So, said Mr. Scott Cairns, any portion of the ship's gear—or, at any rate, of its ordinary gear—which might be required at any loading port for loading any cargo which the charterer was entitled to bring alongside must be ready when notice of readiness is given, and, if it is not, the charterers are entitled to give notice of cancellation. I am unable to accede to this argument. I agree with the judge that there is a difference, if not in principle, at least in the application of the principle, between space in the hold and readiness of ship's gear. The charterer is responsible for bringing the goods alongside, but the method of loading the goods when brought alongside is a matter for the shipowner. As the judge said, some of the ship's gear may not be required at all; some of it may not be needed until an advanced stage of the loading; and the keeping of it in constant readiness from the first moment to the last may involve labour and expense unnecessarily without any advantage to the charterer.

(30) C. & E. 309.

Where a charterer gives notice of cancellation, the onus is on him to prove the existence of a state of circumstances which justify him in giving such a notice. As regards ship's gear, I do not think he discharges that onus by proving that a part of the gear was not available at the first port of loading, if it is established, as in substance it was in the present case, that it could not be required for use at that port; nor do I think that the mere fact that it might be required at a subsequent loading port is enough to discharge the onus of proof which rests on the charterer, or shift it to the shipowner. The charterer must, I think, at least prove that it might be required at the subsequent port, and that it or a substitute for it would not be available if required. Like the learned judge, I derive some support from the cases which he cited. If the strict rule which Mr. Scott Cairns advocated was in fact the law, it seems to me that the defendant would have been entitled to succeed in *Vaughan* v. *Campbell, Heatley & Co.* (31), since wheat was a permitted cargo and the ship was not lined to receive it.

Mr. Scott Cairns relied particularly on *Sun Shipping Co. Ld.* v. *Watson and Youell Shipping Agency Ld.* (32); but in that case the shifting boards were required at the first port of loading and it was found that some were not available. Moreover, the question at issue was when lay days commenced. Had the issue been as to the validity of a notice of cancellation, and had the charterers sought to rely on the fact that shifting boards were required at a second port of loading, I do not think that they would have succeeded without proving that probably the shifting boards would not be available on arrival at that port.

If I have correctly stated the law, it necessarily follows that the judge reached the right conclusion, since the umpire has found that there was no evidence to prove the material fact that the loading gear would have been defective when required. For these reasons I agree that the appeal should be dismissed.

ASQUITH, L.J. I agree entirely with both the judgments just delivered.

Appeal dismissed.

Solicitors: *Treasury Solicitor; Holman, Fenwick & Willan.*

A. W. G.

---

(31) 2 T. L. R. 33.

(32) 49 T. L. R. 240.

1950
Feb. 8, 9, 10;
Mar. 6.

Devlin J.

C. A.
1950
July 19, 20.

Tucker, Cohen and Asquith L.JJ.

CHANDRIS *v.* ISBRANDTSEN-MOLLER CO. INC.

Shipping—Charterparty—Cargo to consist of lawful general merchandise excluding acids, explosives, arms, ammunition " or other dangerous " cargo "—Construction—Ejusdem generis rule—Turpentine loaded with knowledge of master—Breach of charterparty—Dangerous cargo—Vessel ordered to unload in river into barges—Resulting delay—Damages for detention—Demurrage—Jurisdiction of arbitrator to award interest.

By s. 4, sub-s. 6, of the United States Carriage of Goods by Sea Act, 1936 (which is in identical terms with art. IV, r. 6, made under the Carriage of Goods by Sea Act, 1924): " Goods of a " . . . dangerous nature to the shipment whereof the . . . master " . . . has not consented, with knowledge of their nature and " character, may . . . be landed at any place or destroyed or " rendered innocuous by the carrier without compensation, and " the shipper of such goods shall be liable for all damages and " expenses directly or indirectly arising out of or resulting from " such shipment. If any such goods shipped with such knowledge " and consent shall become a danger to the ship or cargo, they " may in like manner be landed at any place or destroyed or " rendered innocuous by the carrier without liability on the part " of the carrier except to general average, if any ".

A voyage charterparty to which s. 4, sub-s. 6, of the United States Carriage of Goods by Sea Act, 1936, applied, stipulated that the cargo was to consist of lawful general merchandise, " excluding " acids, explosives, arms, ammunition or other dangerous cargo ", and contained a demurrage clause. At Jacksonville, U.S.A., the master consented to the shipment of 1,546 tons of turpentine with knowledge of its nature and character, but did not thereby waive any of the rights or remedies of the owner in respect of the shipment; nor had he any authority from the owner to do so. The vessel reached Liverpool on May 25, 1941, and began discharging in dock on May 27. On May 29, because of the dangerous nature of the turpentine, she was ordered by the Port Emergency Committee to move out of the dock and to unload in the Mersey into barges, with the result that the unloading took sixteen days longer than it would otherwise have taken. On a claim by the shipowner for demurrage, damages for the sixteen days' detention of the vessel at Liverpool, and interest,

Held, (1.) that the general words in a commercial document were, not less than in the case of a document such as a settlement, prima facie to be construed as having their natural and larger meaning, and not to be limited to things ejusdem generis with those previously enumerated unless there were something in the document showing an intention so to limit them, that the charterparty showed no such intention, and therefore, the words " or other dangerous " cargo " were to be construed as including turpentine: *Anderson* v. *Anderson* [1895] 1 Q. B. 749 (concerning a settlement), applied.

(2.) That there could not be implied into the second part of s. 4, sub-s. 6, of the United States Carriage of Goods by Sea Act, 1936 (concerning the case where the dangerous goods have been shipped with the master's consent), a provision, in contrast to that in the first part, that a shipper was not liable for damage resulting from the shipment of dangerous goods to which the master had consented.

(3.) That there had been a breach of the charterparty by the charterers since, on the construction of that document as a whole, it prohibited the shipment of dangerous cargo to which the master had consented as well as that to which he had not.

(4.) That, notwithstanding this breach, the damages for the additional sixteen days spent unloading by reason of the discharge having to be made in the river were governed by the demurrage clause, because the shipowner had affirmed the contract and treated the dangerous cargo as coming within the contract description (subject to his right to damages): with the result that all the clauses of the charterparty applied thereto: *Inverkip S.S. Co. Ld.* v. *Bunge & Co.* [1917] 2 K. B. 193, followed. *A/S Reidar* v. *Arcos Ld.* [1927] 1 K. B. 352, explained.

(5.) That the arbitrator had no jurisdiction to award interest: *Podar Trading Co. Ld., Bombay* v. *Francois Tagher, Barcelona* [1949] 2 K. B. 277, followed.

On appeal, only the question of the arbitrator's power to award interest remaining in issue,

Held, that the power of an arbitrator to award interest was derived from the submission to him, which impliedly gave him power to decide "all matters in difference" according to the existing law of contract, exercising every right and discretionary remedy given to a court of law; that the Law Reform (Miscellaneous Provisions) Act, 1934, which repealed s. 28 of the Civil Procedure Act, 1833, was not concerned with the powers of arbitrators; and that the plaintiff was entitled to the interest provisionally awarded by the arbitrator.

Podar Trading Co. Ld., Bombay v. *Francois Tagher, Barcelona* [1949] 2 K. B. 277, overruled on this point.

Observations of Jervis C.J. in *Edwards* v. *Great Western Ry. Co.* (1851) 11 C. B. 588, and of Lord Salvesen in *Ram Dutt Ramkissendass* v. *E. D. Sassoon & Co.* [1929] W. N. 27; 98 L. J. (P. C.) 58, applied.

SPECIAL CASE stated by an arbitrator.

A voyage charterparty dated November 22, 1940, made between J. D. Chandris, as shipowner, and the Isbrandtsen-Moller Co. Inc., as charterers, provided in cl. 26 that the cargo was to "consist of lawful general merchandise, excluding acids, "explosives, arms, ammunition or other dangerous cargo". By cl. 15, "Should the cargo not be delivered to vessel at loading "ports and/or discharged at port of destination within the "specified time, for each and every day over and above the said "lay days, charterers are to pay, day by day, the sum of 100*l.*

1950

CHANDRIS
v.
ISBRANDTSEN-MOLLER
CO. INC.

"British Sterling demurrage". The charterparty incorporated the provisions of s. 4, sub-s. 6, of the United States Carriage of Goods by Sea Act, 1936, by which: "Goods of an inflammable, "explosive or dangerous nature to the shipment whereof the . . . "master . . . has not consented, with knowledge of their nature "and character, may . . . be landed at any place or destroyed or "rendered innocuous by the carrier without compensation, and "the shipper of such goods shall be liable for all damages and "expenses directly or indirectly arising out of or resulting from "such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, "they may in like manner be landed at any place or destroyed "or rendered innocuous by the carrier without liability on the "part of the carrier except to general average, if any".

The facts found by the arbitrator were as follows: in March, 1941, the *Evgenia Chandris* loaded under the voyage charter at Jacksonville, U.S.A., a general cargo which included 1,546 tons of turpentine. Turpentine was a dangerous cargo. The master consented to its shipment with knowledge of its nature and character, but did not thereby waive any of the rights or remedies of the owner in respect of the shipment, nor had he any authority from the owner to do so. The vessel arrived at Liverpool, the port of discharge, on May 25, 1941, and began discharging in dock on May 27. On May 29, because of the dangerous nature of the turpentine, she was ordered by the Port Emergency Committee to move out of the dock and to unload in the Mersey into craft, with the result that the discharge took sixteen days longer than it would otherwise have done. The time taken in loading and unloading exceeded the stipulated lay days by twenty-two and a-half days.

In the arbitration the shipowner claimed demurrage and damages. The arbitrator held that turpentine was a dangerous cargo within the meaning of cl. 26 of the charterparty; that the shipment of the turpentine was a breach of charterparty although it was with the knowledge and consent of the master and the charterparty incorporated s. 4, sub-s. 6, of the United States Carriage of Goods by Sea Act, 1936; that the shipowner was entitled to 79*l*. 5*s*. extra expenses incurred by reason of the discharge having to be made in the river; 7,529*l*. 15*s*. damages for detention for the sixteen days (in addition to six and a-half days' demurrage), and 170*l*. interest; and that the owner's claim was not limited to the figure fixed for demurrage by cl. 15 of the charterparty. The charterers appealed.

The questions for the decision of the court were:—(1.) Was the turpentine a dangerous cargo within the meaning of cl. 26 of the charterparty? (2.) Was the shipment of the turpentine with the knowledge and consent of the master, having regard to the incorporation in the charterparty of s. 4, sub-s. 6, of the United States Carriage of Goods by Sea Act, 1936, a breach of the charterparty? (3.) Was the claimant entitled to damages for detention in respect of the sixteen additional days' unloading, or only to demurrage at the rate fixed by cl. 15? (4.) Had the arbitrator jurisdiction to award interest?

A. J. Hodgson and *Boyes* for the charterers.
Mocatta and *M. R. Holman* for the shipowner.

Cur. adv. vult.

March 6. DEVLIN J., reading his judgment, stated the facts as set out above and continued: I can decide this last question (whether the arbitrator had jurisdiction to award interest) at once. In *Podar Trading Co. Ld.* v. *Tagher* (1) the Divisional Court answered the same question in the negative. Whether or not I am technically bound by a decision of the Divisional Court, I propose to follow this one as a recent and authoritative pronouncement on the law, and I have not therefore invited argument on it.

The first question (whether turpentine was a dangerous cargo within the meaning of cl. 26 of the charterparty) depends on the construction of that clause, which provides: "Cargo to consist "of lawful general merchandise, excluding acids, explosives, "arms, ammunition or other dangerous cargo". The question is whether "other dangerous cargo" is to be construed ejusdem generis with what goes before. Mr. Hodgson, who says that it is, contends that the question turns on whether or not the rule is correctly stated in the following passage in Scrutton on Charterparties (15th ed.), p. 239: "It must be remembered that the "question is whether a particular thing is within the genus that "comprises the specified things. It is not a question (though "the point is often so put in argument) whether the particular "thing is like one or other of the specified things". McCardie J. quoted this paragraph with approval in *S.S. Magnhild (Owners)* v. *McIntyre Brothers and Company* (2). The alternative view, which the paragraph condemns, is the one for which Mr. Hodgson contends, and he can cite in support of it the dictum of Greer J. in *A/S. Frank* v. *Namaqua Copper Co. Ld.* (3). If the former view is right, Mr. Hodgson cannot suggest a genus which would not include turpentine, and so he would fail. If the latter view is right, it is not suggested that turpentine is like any of the specified things, and so Mr. Hodgson would succeed. Initially, Mr. Hodgson presented his argument as if the choice lay between these two interpretations of the rule and as if there was no question but that the rule in one or other form applied. But I think this is the first question that I have to determine, and indeed, without examining the nature and scope of the rule, I should not be able to find a satisfactory answer on the point propounded.

---

(1) [1949] 2 K. B. 277.
(2) [1920] 3 K. B. 321, 332.
(3) (1920) 36 T. L. R. 438, 441.

Anderson v. *Anderson* (4) is a decision of the Court of Appeal in relation to a post-nuptial settlement in which all three Lords Justices clearly laid it down that general words were prima facie to be considered as having their natural and larger meaning and not to be restricted to things ejusdem generis previously enumerated, unless there was something in the deed to show an intention so to restrict them. In *Tillmanns & Co.* v. *Steamship Knutsford Ld.* (5) Vaughan Williams L.J., without impeaching the authority of *Anderson* v. *Anderson* (4), set out other authorities to the opposite effect designed to show that it is the restricted meaning which primarily attaches to the general words. It is perhaps important that this case concerned a charterparty. In *Thorman* v. *Dowgate Steamship Co. Ld.* (6) Hamilton J., also dealing with a charterparty, thought it unnecessary to embark on this discussion. *Anderson* v. *Anderson* (4) is a decision which, unless distinguishable on the ground that I am concerned with a commercial document rather than a settlement, is binding on me. Apart from its authority, if I may respectfully say so, I entirely agree with it.

A rule of construction cannot be more than a guide to enable the court to arrive at the true meaning of the parties. The ejusdem generis rule means that there is implied into the language which the parties have used words of restriction which are not there. It cannot be right to approach a document with the presumption that there should be such an implication. To apply the rule automatically in that way would be to make it the master and not the servant of the purpose for which it was designed—namely, to ascertain the meaning of the parties from the words they have used. The first approach will often plainly show that the words are used far more widely than the parties could have intended; as, for example, " all other perils " in the policy which formed the subject of the well-known decision of *Thames and Mersey Marine Insurance Co. Ld.* v. *Hamilton, Fraser & Co.* (7). The so-called rule is, in short, really only a recognition of the fact that parties with their minds concerned with the particular objects about which they are contracting are apt to use words, phrases or clauses which, taken literally, are wider than they intend. Under the description of ejusdem generis the principle is applied to words only. But it is not different

(4) [1895] 1 Q. B. 749.
(5) [1908] 2 K. B. 385.
(6) [1910] 1 K. B. 410.
(7) (1887) 12 App. Cas. 484.

from the principle which restricts the meaning of clauses if literally they are inconsistent with the main object of the contract, as in *Glynn* v. *Margetson & Co.* (8). The same principle is put to work when it is sought to apply such clauses to events not contemplated by the contract, as in *Metropolitan Water Board* v. *Dick, Kerr & Co. Ld.* (9), and other similar cases in which frustrating events, though literally covered by the wide language of suspension clauses, have been held not to be within them.

I cannot think that Lord Macnaghten in his rather cryptic observation in *Steamship Knutsford Ld.* v. *Tillmanns & Co.* (10) or Hamilton J. in *Thorman* v. *Dowgate Steamship Co. Ld.* (11), were intending to say that the rule should be applied more stringently in the case of commercial documents than in the case of settlements. If that is what these two great lawyers had in mind it would be impossible for me to differ from them. But I find that hard to credit. Legal draftsmen are all familiar with the existence of the rule, and familiar too with the proper signals to hoist if they do not want it to apply. Phrases such as " whether or not similar to the foregoing " and " without prejudice to the generality of the foregoing " are often employed in legal draftsmanship; and if the draftsman has read the report of *Larsen* v. *Sylvester & Co.* (12), he will know that the addition of " whatsoever " generally serves the same purpose. Commercial draftsmen are not usually taught these rules.

Moreover, the main argument of construction which justifies the application of the rule does not apply in commercial documents. It is that if the general words have an unrestricted meaning the enumerated items are surplusage. The presumption against surplusage is of little value in ascertaining the intention of the parties to commercial documents, as many great commercial judges have recognized. In *Burrell & Sons* v. *F. Green & Co.* (13), Bailhache J. said that he was unimpressed by the argument of redundancy " because charterparties often contain " many redundant words ". In *Schloss Brothers* v. *Stevens* (14), Walton J. stated: " It was said for the defendant that, if all " risks were covered, why refer specially to risks of robbery with " or without violence, negligence, etc.? On the other hand, it " is very common to find in such contracts, although perfectly " general words are made use of, including practically all risks, " special reference to particular perils to which it is desired to " draw special attention." Scott L.J. in *Beaumont-Thomas* v. *Blue Star Line Ld.* (15), referred to the same habit, but less kindly, as " the common and pernicious practice of cramming a

---

(8) [1893] A. C. 351.
(9) [1918] A. C. 119.
(10) [1908] A. C. 406, 409.
(11) [1910] 1 K. B. 410.
(12) [1908] A. C. 295.
(13) [1914] 1 K. B. 293, 303.
(14) [1906] 2 K. B. 665, 673.
(15) (1939) 55 T. L. R. 850, 852.

" contract with particular illustrations of some general stipulation, which in a legal sense are wholly unnecessary, and just " because they are unnecessary often afford a pretext for limiting " general words in a way that was never intended ".

Draftsmen of charterparties—whether of the printed form or of the typewritten clause, but perhaps especially of the latter—are probably not consciously familiar even with the idea of ejusdem generis. The charterparty in the present case refers, for example, to " a full and complete cargo of wheat and/or maize " and/or other lawful merchandise ". Nobody has ever, I think, suggested that by such a charterparty the merchandise has to be similar to wheat or maize; although the first question which would occur to a lawyer would be to ask himself why the parties bothered to refer to wheat or maize if they meant that the cargo might be anything from chalk to cheese, including turpentine.

I apply the principle laid down in *Anderson* v. *Anderson* (16) and so inquire whether there is anything in the text of this charterparty or in the circumstances in which it was made which would lead me to suppose that the parties intended " other " dangerous cargo " to have some limited meaning. I can find no such indication. It seems to me that the only reason why the owner is objecting to acids, explosives, arms or ammunition is because they are dangerous; and that being so he may be presumed to have the same objection to all other dangerous cargo. On this ground, therefore, I think that Mr. Hodgson's contention fails.

This makes it unnecessary for me to consider the other point regarding the ejusdem generis rule. But since it was fully argued, and is a point much in dispute, I may permit myself to express shortly my view of it. If the ejusdem generis principle is a rule of automatic application, it becomes of the first importance to determine exactly what the rule is. If it is merely, as I think, an aid to ascertaining the intention of the parties, no point of controversy need arise at all. If there is something to show that the literal meaning of the words is too wide, then they will be given such other meaning as seems best to consort with the intention of the parties. In some cases it may be that they will seem to indicate a genus; in others that they perform the simpler office of expanding the meaning of each enumerated item. If a genus cannot be found, doubtless that is one factor indicating that the parties did not intend to restrict the meaning of the words. But I do not take it to be universally true that whenever a genus cannot be found the words must have been intended to have their literal meaning, whatever other indications there may be to the contrary. I see no reason why, if it accords with the apparent intention of the parties, the words should not be treated, as suggested by Lord Macnaghten in *Thames and Mersey Marine Insurance Co. Ld.* v. *Hamilton, Fraser & Co.* (17), as being "inserted in order to prevent disputes founded on nice distinctions" and "to cover in terms whatever may be within the "spirit of the cases previously enumerated".

---

(16) [1895] 1 Q. B. 749.

The next question is the effect of s. 4, sub-s. 6, of the United States Carriage of Goods by Sea Act, 1936. This sub-section, which is in identical terms with the corresponding rule (art. IV, r. 6) in the Schedule to the Carriage of Goods by Sea Act, 1924, is in two parts. The first part refers to dangerous goods to the shipment whereof the master has not consented; and the second part deals with such goods to the shipment whereof he has consented. With regard to the first class, the rule provides that the goods may be landed or destroyed without compensation and that the shipper shall be liable for damages resulting from the shipment. With regard to the second class the rule provides only that the goods, if they become a danger to ship or cargo, may be landed or destroyed; and this is subject to the carrier's liability for general average, if any. This second part says nothing at all about liability for damage. Mr. Hodgson argues that since the first part expressly makes the shipper liable for damages and the second part is silent, there must be implied into the second part a provision in contrast to the first that the shipper is not liable for damages.

If this reading of the rule is right, Mr. Hodgson next contends that the charterparty, construed as a whole, does not prohibit absolutely the shipment of all dangerous cargo, but only of dangerous cargo to the shipment whereof the master has not consented.

I need not explore the merits of this further contention, for I can see no ground for making the implication in the rule which Mr. Hodgson requires. If it was clear that the Act was intended to provide a complete code in relation to the matters with which it dealt, it might be argued that it could not have deliberately remained silent in respect of cargo of the second class, and therefore that some implication must be made. But the Act is not intended as a code. It is not meant altogether to supplant the contract of carriage, but only to control on certain topics the freedom of contract which the parties would otherwise have. I see no reason why it should not be silent on such topics as the consequences of shipping cargo with the consent of the master, leaving the matter to be regulated by the parties themselves. On the contrary, I see good reason why silence might be thought desirable, for the consequences might well depend on the terms in which the consent was given or the circumstances in which it was given.

---

(17) 12 App. Cas. 501.

Accordingly, I decide both the first two questions against the charterers and I agree with the arbitrator's conclusion that there has been a breach of the charterparty.

I have next to determine whether the damages for the detention are at large or are governed by the demurrage clause, cl. 15. The discharge took twenty-two and a-half days over and above the lay days. The owner has claimed and has been awarded demurrage in respect of six and a-half of those days; and the fact that the nature of the cargo was responsible for increasing the discharging time from six and a-half days to twenty-two and a-half days at first sight appears to be irrelevant, since the clause seems wide enough to apply to delay in discharging however caused. In holding that the clause did not apply, the arbitrator expressed his view in the award in the following terms: "I hold that "demurrage clauses, like freight and exceptions clauses, are "designed to apply only where cargo of the kind (if any) specified "in the contract of affreightment is shipped; and that in cl. 15 "of the charterparty in question the words 'the cargo' refer to "contract cargo and not to cargo shipment of which is prohibited "by the contract. If the charterparty had permitted or provided "for carriage of dangerous cargo, the number of lay days and the "demurrage rate agreed upon might have been quite different. "The basis of all the contractual provisions was that dangerous "cargo should not be loaded". Coming as it does from an arbitrator of great learning and experience, this view is entitled to deep respect.

It was at one time thought that if the owner or charterer committed a breach of some fundamental or basic condition of the contract, such as is involved, for example, in a deviation from the contract voyage, the exceptions clauses in the contract were displaced and the contract could be enforced by the aggrieved party without granting to the other the benefit of any of the exceptions which might otherwise have protected him. The law on this matter was settled by the House of Lords in *Hain Steamship Co. Ld.* v. *Tate & Lyle Ld.* (18), where it was held that it was governed by the ordinary law of contract. The deviation was a fundamental breach going to the root of the contract, and the aggrieved party was entitled either to rescind or to affirm; if he affirmed, he retained his right to damages for the breach, but the contract with all its terms and conditions remained alive for the benefit of the wrongdoer as well as of himself. In the case of the shipment of cargo outside the contract, the owner has in effect a similar right of election, as is instanced by *Steven and Another* v. *Bromley & Son* (19); he can treat the shipment as a request

(18) (1936) 52 T. L. R. 617.

(19) [1919] 2 K. B. 722.

to carry the cargo at a reasonable remuneration; and if he accepts it the freight clause in the contract will not apply to the non-contractual cargo. Here again no principle is involved peculiar to contracts of carriage and freight clauses, but only the ordinary law.

In these cases the old contract is not displaced unless there is either a recission of it or evidence from which a new contract can be implied. Mr. Mocatta does not contend that either event has taken place in this case, and neither is alleged in the pleadings in the arbitration which are attached to the award. The owners had previously taken freight in respect of the dangerous cargo at the charterparty rate, and they claimed in the arbitration, as I have said, under the demurrage clause in respect of six and a-half days. What Mr. Mocatta contends is that the demurrage clause, while it remains generally effective, is not of its nature applicable to the consequences of the shipment of dangerous cargo. If I understood his argument rightly, it can be considered in two aspects: the clause is inapplicable, first, because the cargo was outside the contractual description, and, secondly, because there was a breach of a fundamental or basic provision of the contract.

A demurrage clause is merely a clause providing for liquidated damages for a certain type of breach. It is presumably the parties' estimate of the loss of prospective freight which the owner is likely to suffer if his ship is detained beyond the lay days. The demurrage rate in this case appears to have been a good deal lower than the freight market rate; and I suppose I need not shut my eyes to the fact that a sum produced by demurrage is generally less than damages for detention, which are presumably assessed by reference to the market rate of freight at the time of the breach. To this extent a demurrage clause may be in practice a concession to the charterer. But I am not, and I do not think I could be, invited to consider it as different in its nature from an ordinary liquidated damage clause.

At first sight it would appear that a demurrage rate should be as applicable to dangerous cargo as to any other sort of cargo. If the discharge of the dangerous cargo takes longer, the demurrage will be larger. Mr. Mocatta has argued, however, that the shipment of dangerous cargo often results in the necessity for paying danger money or some other sort of bonus to officers and crew; and so, if the contract had covered dangerous cargo, a higher rate of freight and of demurrage might well have been demanded. The arbitrator thought so too; so let it be accepted. It seems to me that it is just because it may well be that neither the demurrage clause nor any other clause of the contract was originally intended to apply to the new situation created by a wrongdoer, that the aggrieved party is given his choice whether he desires them to apply or not. If he thinks that the freight and demurrage rates provided by the contract are insufficient to compensate him, he can rescind and sue on an implied contract for an adequate remuneration.

A further consideration reinforces this view. It is not contended by Mr. Mocatta that the owner has any option in the matter of applying the demurrage clause. His argument is that it does not apply at all, whether the owner wants it or not. The result is that if the demurrage rate were higher than the market rate of freight at the time of the detention—and even though the former may be designed to be lower, there is always the possibility of a slump in freight rates—the owner would be bound to take the lower rate and the wrongdoer would thus profit from his own wrong.

In *Hain Steamship Co. Ld.* v. *Tate and Lyle Ld.* (20), a similar consideration assisted Lord Atkin (21) and Lord Wright M.R. (22) to reject the argument that deviation automatically cancelled the contract, and to prefer the view that it gave the aggrieved party the option of rescinding or affirming. But it is plain that after an election to affirm the whole there cannot be a further option to rescind in part. So Mr. Mocatta is driven to argue that the impact of the new situation ipso facto robs the clause of applicability. That might be so if it had been due to no wrongdoing. The principle laid down in *Jackson* v. *Union Marine Insurance Co.* (23), requires that the contract should become inapplicable without any default of either party. Where there is default, the offended party has the advantage of making his choice.

It does not appear to me that the argument, the general nature of which I have considered, is rendered any more attractive by being put as a matter of construction of the demurrage clause and reading " the cargo " in that clause as referring to contract cargo. If this is true of the demurrage clause, it must be true of every other clause. It must follow, therefore, that, notwithstanding that the contract as a whole is affirmed, no clause in it which refers expressly to " the cargo " can be applicable to the dangerous cargo. A glance at other clauses of the charterparty shows the devastating effect that this would have. But, of course, all the clauses expressly or impliedly refer to " the cargo ", and whether the words are expressly used or not is often a mere accident of draftsmanship. The argument seems to me to lead logically to the conclusion that no part of the affirmed contract can apply. I think the true view is that the party who affirms the contract in circumstances such as this treats the dangerous cargo, subject to his right to damages, as coming within the contract description; and that the term "the cargo" is to be construed accordingly.

---

(20) 52 T. L. R. 617.

(21) Ibid. 619.

(22) Ibid. 622.

(23) (1874) L. R. 10 C. P. 125.

I turn now to consider the second aspect of this argument whereunder Mr. Mocatta distinguishes between the breach of a fundamental obligation and the breach of an ordinary term, contending that the demurrage clause does not apply to the former. There is an express obligation on the charterer under this charterparty to furnish a full and complete cargo of lawful merchandise. He has broken that obligation, and it is not disputed that thereby he broke a fundamental obligation, by which I understand to be meant a condition going to the root of the contract the breach of which entitled the owner to rescind. No doubt in the circumstances of this case, as they were explored in the arbitration, that was a proper view to take. The turpentine consisted of 1,546 tons, though what proportion of the cargo it formed I do not know. Mr. Mocatta says that unless it was de minimus there is a breach entitling the owner to rescind, just as he would be able to reject in a contract for the sale of goods. If this is so, the question of the master's implied authority to consent to shipment may require some consideration. If it be the law that an owner who at the end of a voyage discovers that a small portion of cargo (enough to be above de minimus) outside the contract description has been shipped, albeit with the knowledge of the master, can tear up the whole contract, it may result in some practical inconvenience. No such question arises for my consideration here, since the owner himself chose to affirm.

The result of the affirmation is that the breach of condition is to be treated as if it were a breach of warranty. In *Wallis, Son & Wells* v. *Pratt & Haynes* (24), Lord Loreburn L.C. put the position in this way: "He may treat the breach of a condition as if it were a breach of warranty, that is to say, he may "have the remedies applicable to a breach of warranty. That "does not mean that it was really a breach of warranty or that "what was a condition in reality had come to be degraded or "converted into a warranty. It does not become degraded into "a warranty ab initio, but the injured party may treat it as "if it had become so, and he becomes entitled to the remedies "which attach to a breach of warranty." In the same case in the Court of Appeal (25), Fletcher Moulton L.J. treated the remedy of damages as being common to all terms of the contract; in the case of a breach of condition, the injured party has the option of another and higher remedy, but if he does not avail himself of it, he will have to be content with his right to damages. I can see nothing in principle to suggest that the damages for the

(24) [1911] A. C. 394, 395.

(25) [1910] 2 K. B. 1003, 1013.

breach of warranty ex post facto, as it is sometimes called, should be any different from those for the breach of warranty ab initio, nor can I see any reason in principle why a liquidated damage clause should not apply with equal efficacy to both.

Mr. Mocatta does not argue that, if the obligation not to load a dangerous cargo had not been in its original form a fundamental obligation, the demurrage clause would not have applied; he would be precluded from doing so by authority. It is useful to review the state of the authorities on this point, because I think that by so doing I can be led to the right conclusion on the merits of Mr. Mocatta's distinction.

It is well settled that in relation to the cargo a charterer has two distinct obligations. The first is to furnish a full and complete cargo which complies with the charterparty; the second is to load and discharge it within the lay days. This distinction first became of practical importance when a charterer, who had failed to get his cargo down to the loading place, contended that he was excused by virtue of an exceptions clause applying to events which prevented loading. In *Sueton D. Grant & Co.* v. *Coverdale, Todd & Co.* (26) the House of Lords held that he was not. Lord Selborne L.C. said (27): "It would appear to me to "be unreasonable to suppose, unless the words make it perfectly "clear, that the shipowner has contracted that his ship may be "detained for an unlimited time on account of impediments, "whatever their nature may be, to those things with which he "has nothing whatever to do, which precede altogether the whole "operation of loading, which are no part whatever of it, but "which belong to that which is exclusively the charterer's business. He has to contract for the cargo, he has to buy the cargo, "he has to convey the cargo to the place of loading and have it "ready there to be put on board; and it is only when he has done "those things that the duty and the obligation of the shipowner "in respect of the loading arises". A similar point was discussed in *Ardan Steamship Company Ld.* v. *Andrew Weir & Co.* (28). The Lord Ordinary said (29): "The delay was caused, not by "the exceptional congestion of shipping, but by the failure of the "defenders to perform their primary duty of providing a cargo, "and the principle upon which a reasonable time is allowed to the "charterers for loading does not apply to such a case". The reference to "primary duty" was adopted by Lord Halsbury L.C. in the House of Lords (30). This appears to be the first place in which the term, which recurs in later cases, was used. Unless it has a special significance in Scots law, I think that the Lord Ordinary was using it merely as a convenient term to describe the nature of the charterer's duty as laid down by Lord Selborne in *Sueton D. Grant & Co.* v. *Coverdale, Todd & Co.* (31). The discharge of the duty is preliminary to the obligation to load; in that sense it is primary.

---

(26) (1884) 9 App. Cas. 470.

(27) Ibid. 475.

(28) [1905] A. C. 501.

(29) Ibid. 502; (1904) 6 F. 294, 300.

(30) Ibid. 510.

The owners obtained damages for detention in both those cases, but no question of demurrage arose. The point was therefore unsettled whether a demurrage clause would apply not only to a failure to load within the lay days, but also to a breach of the primary obligation. This question was answered in the affirmative in *Inverkip Steamship Co. Ld.* v. *Bunge & Co.* (32). This was a decision of the Court of Appeal in which Warrington and Scrutton L.JJ. delivered judgments with which Lord Cozens-Hardy M.R. concurred. It will suffice to quote two passages. Warrington L.J. said (33): " It was contended that on the true " construction of the charterparty the clause I have read "—that is to say, the demurrage clause—" is confined to mere delays in " loading and does not extend to cover detention occasioned by " failure to provide a cargo. Reliance was placed on the case " of *Ardan Steamship Company Ld.* v. *Andrew Weir & Co.* (34) " as establishing that the obligation to load in accordance with " the charterparty and the obligation to provide a cargo are " separate and distinct obligations, and I accept that view. But " I cannot hold that in the present case the provision for demur- " rage is confined to delay in loading ". Scrutton L.J. said (35): " If there was a breach in not having cargo ready on August 25 " the only consequence is detention of the ship, and the damages " for that, which is the same detention, however it arises, are " agreed in the charter and have been paid ".

The authority of this case concludes the point which I have to determine unless it can be distinguished, as Mr. Mocatta seeks to do, on the ground that in it the delay in providing the cargo was not a breach of a fundamental obligation. It is argued that the furnishing of a cargo contrary to the charterparty is a breach of contract which by itself and forthwith goes to the root of the matter, whereas delay in providing a cargo depends on the length of the delay. It was not considered necessary in *Inverkip Steamship Co. Ld.* v. *Bunge & Co.* (32) to decide whether the delay was sufficiently long to entitle the owner to rescind if he had so desired. Sankey J., in the court below (36), thought that it was; Warrington L.J. (37) expressed no opinion; and Scrutton L.J. (38) thought that it was not, inasmuch as the circumstances showed that the charterer was not repudiating. The case does, however, show that nobody thought it important to determine whether the breach was fundamental or not. To that extent it accords with the view that I have already expressed and it remains therefore to consider the authority on which Mr. Mocatta relies as showing that the point is decisive. This is the judgment of Sargant L.J. in *A/S. Reidar* v. *Arcos Ld.* (39).

---

(31) 9 App. Cas. 470.
(32) [1917] 2 K. B. 193.
(33) Ibid. 198.
(34) [1905] A. C. 501.
(35) [1917] 2 K. B. 193, 203.
(36) [1917] 1 K. B. 31.
(37) [1917] 2 K. B. 198.
(38) Ibid. 201.

That case decided a point up to then left undetermined. *Inverkip Steamship Co. Ld.* v. *Bunge & Co.* (40) had decided that damages for detention for breach of the obligation to provide a cargo were covered by the demurrage clause. But supposing that the breach of such an obligation gave rise to damages of a different character, not for detention at all. The demurrage clause could not then provide the measure. Ought the clause to be construed as exhaustive, so that no damages which could not be measured by it could be recovered at all, or ought it to be construed merely as applying to damages for detention, leaving damages of any other character to be assessed at large? The Court of Appeal in *A/S. Reidar* v. *Arcos Ld.* (41) decided the latter. The facts were that the vessel was chartered to carry a cargo of timber from a White Sea port to an English port. If she reached the English port before October 31 she could discharge there a cargo of 850 standards; but if she reached there after that date she could not, by reason of the Merchant Shipping Act, 1906, enter the port with more than 544 standards. That meant that to carry a full and complete cargo her loading must be completed by October 20. In breach of the charterparty it was not completed by that date with the result that she did not load more than 544 standards, and the owners sued the charterers for dead freight.

This is a problem which might be dealt with in one of two ways. One way is to say that there has been a breach of contract causing dead freight as damage and that dead freight is not excluded by the demurrage clause, which is not exhaustive; on that way of looking at it the question whether the breach was of a primary or fundamental duty is irrelevant. The alternative way is to say that there has been a breach of the primary or fundamental obligation to load a full and complete cargo and therefore that the demurrage clause does not apply; upon that way of putting it the nature of the damage, whether it was dead freight or detention, would be irrelevant. It seems to me plain that the Court of Appeal chose the former way of dealing with it. Bankes L.J. thought it unnecessary to decide whether there was a breach of the obligation to load a full and complete cargo, and said (42) that the loss was recoverable simply as damages for the breach of contract to load at the agreed date. Atkin L.J.

---

(39) [1927] 1 K. B. 352.
(40) [1917] 2 K. B. 193.
(41) [1927] 1 K. B. 352.
(42) Ibid. 362.

said (43): "If the lay days expire without a full cargo having "been loaded the charterer has broken his contract. The pro-"visions as to demurrage quantify the damages, not for the "complete breach, but only such damages as arise from the "detention of the vessel". Neither of these Lords Justices referred in terms to any primary or fundamental obligation. Greer J. in the court below (44) and Sargant L.J. (45) did refer to the breach of a primary obligation; and it is on the latter judgment particularly that Mr. Mocatta relies. Sargant L.J. said: "The loss inflicted on the owners and claimed by them is loss of "another character—namely, loss of freight caused by the breach "by the charterers of their contract to load a full and complete "cargo, as prescribed by cl. 1 of the charterparty. The obliga-"tion of cl. 1 is, in my judgment, rightly described by the learned "judge as the primary obligation. The object of the second "sentence of cl. 3 is to provide compensation for a detention of "the vessel in the course of fulfilling this primary obligation, not "to give compensation for the breach of the primary obligation "itself".

Neither Greer J. nor Sargant L.J. in the passages which I have quoted disregarded the fact that the loss caused was dead freight; Sargant L.J. particularly referred to it. If they had been intending to decide the case on the ground that the demurrage clause did not apply to the breach of a primary obligation, it would clearly be necessary to distinguish *Inverkip Steamship Co. Ld.* v. *Bunge & Co.* (46) and explain the difference in the character of the obligations in the two cases. In my judgment the ratio decidendi in *A/S. Reidar* v. *Arcos Ld.* (47) is to be found in the judgments of Bankes and Atkin L.JJ., and the reference by Sargant L.J. to a primary obligation is, strictly speaking, irrelevant. I think that the point which I have to consider is in principle determined by *Inverkip Steamship Co. Ld.* v. *Bunge & Co.* (48) and is not touched by the reasoning in *A/S Reidar* v. *Arcos Ld.* (49).

In the result I think that the damages are limited by the demurrage clause.

S. C.

The plaintiff shipowner appealed only on the question whether the arbitrator had jurisdiction to award interest.

Mocatta and *M. R. Holman* for the shipowner.
Roskill K. C. and *Boyes* for the charterers.

---

(43) Ibid. 363.
(44) [1926] 2 K. B. 83, 88.
(45) [1927] 1 K. B. 366.
(46) [1917] 2 K. B. 193.
(47) [1927] 1 K. B. 352.
(48) [1917] 2 K. B. 193.
(49) [1927] 1 K. B. 352.

C. A.

1950

CHANDRIS
v.
ISBRANDTSEN-MOLLER
CO. INC.

TUCKER L.J. The case stated dealt with a number of issues arising out of a charterparty which the deceased shipowner, in respect of whose estate his wife, the claimant, was administratrix, had entered into with the respondent charterers for the charter of a steamship called the *Evgenia Chandris*. We are only concerned with one aspect of the case. In the result, it has been held by Devlin J., that the shipowner is entitled to 2,137*l*. 10*s*. 0*d*. by way of demurrage, and to one other small sum in respect of certain other items. The question which arises is whether, on the amount awarded for demurrage, interest can or cannot be awarded by the arbitrator. In the case the arbitrator referred to that matter as follows: "The [shipowner] also claimed interest. "A further question for the decision of the court is whether I "have jurisdiction to award interest. If the court answers the "stated question in the affirmative, then I award that the "[charterers] do pay to the claimant the sum of 170*l*. as interest "on 2,137*l*. 10*s*. 0*d*.".

The question what his powers were, does not appear to have been fully argued before the arbitrator, nor before Devlin J., because of the decision of the Divisional Court in *Podar Trading Co. Ld., Bombay* v. *Francois Tagher, Barcelona* (50), the judgment in which was apparently delivered on May 12, 1949, a few months before this special case was signed on August 13, 1949. On this part of the case Devlin J., said (51): "I can decide this "last question at once. In *Podar Trading Co. Ld., Bombay* v. "*Francois Tagher, Barcelona* (50), the Divisional Court answered "the same question in the negative. Whether or not I am "technically bound by a decision of the Divisional Court, I "propose to follow this one as a recent and authoritative "pronouncement on the law, and I have not therefore invited "argument upon it". He accordingly answered one of the questions submitted by the arbitrator to the effect that interest could not be awarded. Therefore, in effect, this is really an appeal against the judgment of the Divisional Court in the case to which I have referred.

Before I refer to that judgment, there are one or two other matters to be mentioned. It is common ground that in the circumstances of this case interest would not have been recoverable at common law. But, it is said by Mr. Mocatta for the shipowner, interest would have been recoverable in these arbitration proceedings by reason of the Civil Procedure Act, 1833; or, rather, interest would have been recoverable by reason of the submission to arbitration of a matter with regard to which interest would have been recoverable if it had been determined in a court of law. Section 28 of the Civil Procedure Act, 1833, reads as follows: "Upon all debts or sums certain, payable at a

(50) [1949] 2 K. B. 277.

(51) Ante, p. 243.

C. A.
1950

CHANDRIS
v.
ISBRANDTSEN-MOLLER
CO. INC.

Tucker L.J.

"certain time or otherwise, the jury on the trial of any issue, or "on any inquisition of damages, may, if they shall think fit, "allow interest to the creditor at a rate not exceeding the current "rate of interest from the time when such debts or sums certain "were payable, if such debts or sums be payable by virtue of "some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have "been made in writing, so as such demand shall give notice to "the debtor that interest will be claimed from the date of such "demand until the term of payment; provided that interest shall "be payable in all cases in which it is now payable by law".

It is to be observed that in that section the right is given, and given only, to a jury, and that the provision is that the jury may "if they shall think fit". Therefore it is a discretionary remedy given to a jury. But it must be remembered that at that date all issues of fact had of necessity to be determined by juries in a court of law and therefore, in effect, the introduction of the jury means very little more than that interest could be awarded by any court which had jurisdiction to determine questions of fact.

In 1851, nearly twenty years after the Act of 1833 had been passed, *Edwards* v. *Great Western Ry.* (52), was decided. One of the matters there considered was whether an arbitrator could or could not award interest in a case which was within the section just quoted. The matter is referred to in the headnote under the sixth heading: "The plaintiff having, after notice of "action, served the company with a written demand of interest "under the statute 3 & 4 Will. 4, c. 42, s. 28.—*Held*, that the "arbitrator, under a submission of 'all matters in difference', "might award the plaintiff interest, notwithstanding the notice "of action did not contain a demand of interest; and, further, "that, assuming a notice of action to have been necessary, the "want or insufficiency of such notice could not be taken advantage of, since the 5 & 6 Vict. c. 97, s. 3, unless pleaded "specially". That aspect of the case is later set out in more detail (53): "On the 10th February, 1848, and before the "commencement of the action, but after the notice thereof, the "plaintiffs served on the company a demand in writing, bearing "date of the 8th February, 1848, whereby they demanded payment of the money alleged in the notice of action to be due to "them, and claimed interest thereon from the date of that "demand until payment. The plaintiffs now contend that they "are entitled to recover such interest, not exceeding five per "cent. per annum, from the 10th of February, 1848, as the "arbitrator may think proper to allow, on all such sums as are "recoverable by them under the foregoing heads of claim, or any

---

(52) (1851) 11 C. B. 588.

(53) Ibid. 638.

"of them. The company contend that the plaintiffs' claims "under the foregoing heads, if recoverable at all, are not such "debts or sums certain as to warrant a jury, or the arbitrator, "in giving interest on them; and also that interest is not "recoverable, because not included in the notice of action. The "last question for the opinion of the court is,—whether, in "addition to any other sum or sums recoverable in this action, "the plaintiffs are entitled to recover interest thereon, if the "arbitrator shall think the case a proper one for giving interest". Jervis C.J., in his judgment, thus dealt with this part of the case (54): "The only remaining question is this,—whether the "arbitrator is at liberty, if he shall think fit, to allow interest "on the sums recoverable in this action. The plaintiffs contend "that Parker has from the commencement been paying a sum "certain to the company in excess of the lawful charge upon "every transaction. There is a demand in writing of the debt, "and a demand of interest under the statute 3 & 4 Will. 4, c. 42, "s. 28. This, therefore, is a sum certain with respect to which "a demand has been made for principal and interest; and the "arbitrator may, if he thinks fit, give interest. But it is said, "on the other hand, that the arbitrator cannot do this, because "the company's Act of Parliament entitles the company to a "notice of action, and the notice of action here does not demand "interest".

The Chief Justice then said that there were two answers to that point—with which we are not concerned—and continued:— "A further answer would be, that this is a submission, not only "of the action, but of all matters in difference; and the interest "would be a matter in difference, whether demanded by the "notice of action or not. If the arbitrator could give it, he might "give it in that way, notwithstanding the want of claim of "interest in the notice".

That case clearly decides that, although the Civil Procedure Act, 1833, speaks in terms of a jury, and only confers upon a jury a discretionary right to give interest, none the less, if a matter is referred to an arbitrator—a matter with regard to which a jury could have given interest—an arbitrator may equally give interest, and that despite the language used in that Act.

That decision has stood from 1851 until 1934, when the Law Reform Act of that year was passed, and it has been referred to in repeated editions of Russell on Arbitration as authority for the proposition that, in such cases, an arbitrator can award interest. Section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, provides as follows:—"In any proceedings tried in any "court of record for the recovery of any debt or damages, the "court may, if it thinks fit, order that there shall be included

---

(54) 11 C. B. 649.

" in the sum for which judgment is given interest at such rate " as it thinks fit on the whole or any part of the debt or " damages for the whole or any part of the period between the " date when the cause of action arose and the date of the " judgment ". The provisos are not material. By s. 3, sub-s 2, " Sections 28 and 29 of the Civil Procedure Act, 1833, shall cease " to have effect ". The result of that, of course, is that if and in so far as the arbitrator derived his power to give costs directly from the Act of 1833, that power necessarily terminated with the repeal of those sections, and there is substituted for them s. 3.

The argument on the one side is that regard must now be had to that section, and that section only, in order to determine what the powers of the arbitrator are, and that that section in terms merely gives a discretionary power to courts of record with regard to any proceedings tried in such a court. The argument on the other side for the shipowner is this: just as the arbitrator in 1851 did not derive his power to give interest directly from the Act of 1833, but from a submission to him of the matters in dispute, so, now, in 1950, the arbitrator in this matter does not derive his jurisdiction to give interest from the Act of 1934, but from the submission to him of the disputes, which necessarily involves that he has to determine those disputes according to the law of the land, and that he is clothed with authority to give to the claimant such rights and remedies as would have been available to him in a court of law having jurisdiction to determine the same subject-matter. And, says Mr. Mocatta, applying the reasoning of Jervis C.J., in *Edwards* v. *Great Western Ry.* (55), to this Act of 1934, in which we find a court of record substituted for a jury, the same result should follow, namely, that we should say that, by reason of the submission, the arbitrator has been clothed with authority to determine this matter of interest in the same way in which it could have been determined by a court of record.

As against that interpretation, Mr. Roskill says: first, the Act of 1934 is silent as to arbitrations and therefore must be taken to have intended that its provisions should not apply to them. He drew our attention to the fact that in the Arbitration Act, 1934, which had been passed two months earlier, there was a special provision in s. 11 providing for interest to be allowed on awards. That section provides: " A sum directed to be paid by " an award shall, unless the award otherwise directs, carry " interest as from the date of the award and at the same rate as " a judgment debt ". Mr. Roskill further points out that the Arbitration Act, 1934, makes no provision for the awarding of interest by the arbitrator as distinct from the interest given under that section, which only runs from the date of the award.

(55) 11 C. B. 588.

Furthermore the policy of the legislature in this matter can be ascertained by seeing what has been done in subsequent Acts, and he quotes the Evidence Act, 1938, the Limitation Act, 1939, the Frustrated Contracts Act, 1943, and the Law Reform (Contributory Negligence) Act, 1945, in all of which special provision for this matter has been made; and it is argued that that shows that the legislature, when it intends to give these powers to an arbitrator, says so in terms.

With regard to that argument, it is not generally permissible to interpret a statute by seeing what has been done in subsequent statutes; but, however that may be, I think that the history of this matter shows that until 1938, or thereabouts, there had been a considerable difference of judicial opinion as to the powers of an arbitrator, in the absence of express provision, for dealing with certain matters—matters which had generally arisen by way of defences expressly made available in answer to actions. The position with regard to such cases is referred to in *Naamlooze, etc., Vulcaan* v. *A/S Ludwig Mowinckels Rederi* (56). There, the House of Lords had to consider this matter as it stood before the Act of 1934 had been passed. In his speech, Lord Maugham said (57): "The matter does not rest there, because "we have to consider how far the suggested elimination of "defences available at law or in equity must logically be held "to extend in other arbitrations. If the party defending may not "rely on the Statute of Limitations, can he rely on the Statute "of Frauds, or the Act partially replacing it? Could he rely in "a commercial arbitration on the Gaming Act? A number of "like questions might be asked. It is true, and this is the main "point on which the appellants rely, that the Limitation Act, "1623, s. 3, was in terms limited to actions. It may be noted "that no such statute passed before the Real Property Limitation "Act, 1833, expressly bound courts of equity. There is, however, no doubt that long before the Judicature Act, 1873, where "a court of equity had to adjudicate on the validity of a debt in "a suit to administer an estate, or in any like suit, it held itself "bound to apply the Statutes of Limitation in precisely the "same way as if there were an action at law to recover the "debt. . . . It is indisputable that, in modern arbitration, "the principles of equity must be applied just as they would now "be applied in a court of law, since upon a special case for the "opinion of the court under s. 7 of the Arbitration Act or the "Judicature Act, 1925, s. 94 (replacing s. 19 of the Arbitration "Act), the court is, and has long been, bound to apply equitable "rules and relief. It is difficult to see how the equitable view "of the applicability of the Limitation Act, 1623, to a case of "debt can be excluded in a legal arbitration".

(56) (1938) 43 Com. Cas. 252.

(57) Ibid. 257.

To omit the next paragraph, Lord Maugham continues: "The "authorities on the question as to whether Statutes of Limitation are available in an arbitration have been carefully "considered by my noble and learned friend Lord Wright, "presiding in the Court of Appeal, and it is not necessary to "repeat them. The hesitation or the doubts expressed by "Scrutton L.J., in *Cayzer, Irvine & Co. Ld.* v. *Board of* "*Trade* (58), appear to be mainly directed against the laying "down of an absolute and general rule applicable in all kinds of "arbitration. At least, that is how I understand them, and, if "I may say so with all respect, to that extent I agree with them. "The remarks of Viscount Cave L.C., in the same case, when "the matter came before this House, certainly tend to show "that, in his view, in commercial arbitrations an arbitrator is "bound to give effect to all legal defences, including a defence "under any Statute of Limitations. On a careful consideration "of all the cases, I am content to say that I agree with what "was said by Lord Salvesen, delivering the judgment of the "Board in *Ram Dutt Ramkissendass* v. *E. D. Sassoon &* "*Co.* (59). In that case the Indian Limitation Act, 1908 (the "relevant period being three years), was taken for practical "purposes to be the same as the Limitation Act, 1623, and Lord "Salvesen observed: 'Although the Limitation Act does not in "'terms apply to arbitrations, they [their Lordships of the "'Judicial Committee] think that in mercantile references of the "'kind in question it is an implied term of the contract that "'the arbitrator must decide the dispute according to the existing "'law of contract, and that every defence which would have "'been open in a court of law can be equally proponed for the "'arbitrator's decision unless the parties have agreed—which is "'not suggested here—to exclude that defence. Were it other-"'wise, a claim for breach of a contract containing a reference "'clause could be brought at any time, it might be twenty or "'thirty years after the cause of action had arisen'".

Mr. Roskill says that a distinction is to be drawn between statutes which bar a remedy, such as the Statutes of Limitation, the Statute of Frauds, the Sale of Goods Act, and so forth, to all of which statutes an arbitrator is bound to give effect notwithstanding that they afford defences to actions, and cases where statutes confer rights where, he says, it is necessary to examine the circumstances in which and the persons on whom the right is conferred; and that right, it is argued, so conferred, is not to be extended beyond the plain words of the enacting statute.

For myself, I cannot see why any distinction should be drawn between the duty of an arbitrator to give effect to such statutes

---

(58) [1927] 1 K. B. 269, 292.

(59) [1929] W. N. 27; 98 L. J. (P. C.) 58.

C. A.
1950

CHANDRIS
v.
ISBRANDTSEN-MOLLER
CO. INC.

Tucker L.J.

as the Statute of Limitations and his jurisdiction to give effect in his discretion to the award of interest. After all, an award of interest is only a part of the damages recoverable, and, to adapt the words of Lord Salvesen in the *Ramkissendass* case (60), which were approved by Lord Maugham, they would read as follows: "Although the Law Reform (Miscellaneous Provisions) Act, "1934, does not in terms apply to arbitrations, I think that in "mercantile references of the kind in question it is an implied "term of the contract that the arbitrator must decide the dispute "according to the existing law of contract, and that every right "and discretionary remedy given to a court of law can be exercised "by him". To that there are, of course, certain well-known exceptions, such as the right to grant an injunction, which stand on a different footing; one of the reasons why an arbitrator cannot give an injunction is, of course, that he has no power to enforce it; but such an objection does not apply to the award of interest.

This matter was discussed fully by Lord Goddard C.J. in delivering the judgment of the court in *Podar Trading Co. Ld., Bombay* v. *Francois Tagher, Barcelona* (61), to which I have referred. He referred to the power to give interest at common law and under the Civil Procedure Act, 1833, and continued (62): "The case which would seem to be directly in point is *Edwards* "v. *Great Western Ry.* (63). In that case the court approved "of the allowance of interest by an arbitrator because it was "allowable in the circumstances of that case by the provisions "of the Civil Procedure Act. Accordingly we think we must "take it to be the law that before the Act of 1934 an arbitrator "had the same powers of the court with regard to the award of "interest, but no greater power".

Lord Goddard C.J. then referred to the Law Reform Act of 1934 and continued: "Moreover, as ss. 28 and 29 of the Civil "Procedure Act are repealed, we feel driven to hold that not only "have arbitrators no power to give interest on damages but they "have been deprived of the powers which they had so long as "the sections of the Civil Procedure Act were in force, and can "now only give it in circumstances in which it was recoverable "at common law".

Mr. Mocatta argued that that judgment was based upon the assumption that it was the Civil Procedure Act, 1833, which gave the arbitrator his power to award interest; that, once that Act was repealed, all such powers had gone; and that, unless the arbitrator were given fresh powers, he had none. I think that that was the reasoning in this judgment. But I agree with Mr. Mocatta that the real basis of *Edwards* v. *Great Western*

---

(60) [1929] W. N. 27; 98 L. J. (P. C.) 58.

(61) [1949] 2 K. B. 277.

(62) [1949] 2 K. B. 289.

(63) 11 C. B. 588.

Ry. (64) was not that the arbitrator derived his powers from the Act of 1833, but that he derived them from the submission to him, which necessarily gave him the " implied powers "—referred to by Lord Salvesen; and I see no reason why, since the Act of 1934, an arbitrator should not be deemed impliedly to have the same powers. Therefore, with diffidence, having regard to the view expressed by the Divisional Court on this matter, I have come to the conclusion that in such a case as this the arbitrator has power to award interest. Accordingly, to that extent, I think, this appeal should succeed and *Podar Trading Co. Ld., Bombay* v. *Francois Tagher, Barcelona* (65) should on this point be overruled.

COHEN L.J. I am of the same opinion. The point is not an easy one. I agree with Mr. Mocatta that this case is really decided for us by *Edwards* v. *Great Western Ry.* (66). That case is not binding on us, but it had stood unchallenged for over eighty years when the Law Reform (Miscellaneous Provisions) Act, 1934, was passed, and I agree with Lord Goddard C.J.'s statement in *Podar Trading Co. Ld., Bombay* v. *Francois Tagher, Barcelona* (67) that before the Act of 1934 an arbitrator had the same powers as a jury to give interest. I think that the Court of Common Pleas reached its conclusion not because it thought that, as a matter of construction of ss. 28 and 29 of the Civil Procedure Act, 1833, the arbitrator fell within the description of a " jury " on the trial of any issue or on any inquisition of damages ", but because it considered that an arbitrator had all the powers in regard to awarding damages which a jury had. In this connexion it is to be remembered that in 1833 all relevant cases would have been heard by a judge with a jury. In my view, the court's decision was not based on any statute: the court considered that, apart from any statute, an arbitrator had all the powers of the appropriate court including the power to award interest in the cases indicated.

By the Law Reform (Miscellaneous Provisions) Act, 1934, ss. 28 and 29 of the Civil Procedure Act, 1833, were repealed, and there has been substituted the provision which my Lord has read. The Divisional Court decided that the effect of that section is to deprive the arbitrator of the power to award damages in accordance with ss. 28 and 29 of the Civil Procedure Act, 1833, without conferring on him the increased powers conferred on a court of record. The Divisional Court arrived at that conclusion with reluctance, and I am glad not to feel myself compelled to agree with it. The section does not purport to refer in any way

(64) 11 C. B. 588.
(65) [1949] 2 K. B. 277.
(66) 11 C. B. 588.
(67) [1949] 2 K. B. 290.

C. A.
1950

CHANDRIS
v.
ISBRANDTSEN-MOLLER CO. INC.

Cohen L.J.

to the powers of arbitrators. It may, of course, have curtailed their powers, but I do not think that in the present case it has done so.

In my opinion, the right of arbitrators to award interest was not derived from ss. 28 and 29 of the Civil Procedure Act, 1833, but from the rule that arbitrators had the powers of the appropriate court in the matter of awarding interest. In my opinion, therefore, the effect of the Act of 1934 is that, after it came into force, an arbitrator had no longer the powers of awarding interest on damages conferred on juries by ss. 28 and 29 of the Civil Procedure Act, 1833, but he had the power conferred on the appropriate court in the Act of 1934 described as a " court of " record ". The change of description may be due to the fact that damages are now usually awarded by a judge sitting alone. I agree with my Lord, for the reasons which he has given, that the conclusion which we have reached is supported by the decision in the *Naamlooze* case (68), and I cannot help thinking that if the attention of the Divisional Court had been directed to that case they might have reached a different conclusion. For those reasons, and for the reasons given by my Lord, I think that this appeal should succeed.

ASQUITH L.J. I agree. I should have found it very difficult to resist the argument presented by Mr. Roskill if *Edwards* v. *Great Western Ry.* (69) had not been decided as it was and had not stood unchallenged for over three-quarters of a century before the Act of 1934 was passed. But for those circumstances, it would have been difficult, it seems to me, to resist a construction of s. 3 of the Act of 1934, which would limit the discretion conferred by that section. But, by parity of reasoning, the right given by the Act of 1833 should have been limited to proceedings before a jury; yet, in *Edwards'* case (69), that contention was impliedly or expressly rejected, and it was held that the right existed at common law. That is how I understand the decision in relation to submissions: that an arbitrator could award interest in cases in which, by statute, a jury was given power to do so. For those reasons, and for the reasons given by my Lords, I think that this appeal should succeed.

Appeal allowed.

Solicitors: *Holman, Fenwick & Willan; Lightbounds, Jones & Co.*

A. W. G.

---

(68) 43 Com. Cas. 252.

(69) 11 C. B. 588.

HOWGATE *v.* BAGNALL AND ANOTHER.

1950
Oct. 30, 31;
Nov. 1, 3.

Barry, J.

Emergency legislation—Extraterritorial operation—War injury—Landing on foreign airfield of aircraft belonging to His Majesty—Subsequent fire—Injury to passenger in aircraft—Whether "war injury"—Whether injury "caused" by impact—Relevant enactment not expressed to have extra-territorial operation—Applicability of schemes made under it to persons injured abroad—Conflict of laws—Tort in India—Whether actionable if committed in England—Personal Injuries (Emergency Provisions) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 82), *s.* 3, *sub-s.* 1; *s.* 8, *sub-s.* 1—*Personal Injuries (Civilians) Scheme,* 1939 (*St. R. & O.*, 1939, *No.* 1143), *art.* 27, *para.* 2.

It was intended to land an aircraft belonging to His Majesty on an airfield in India. The aircraft touched down on a runway but again became airborne and then touched down on rough ground. The aircraft taxied some 550 yards towards the edge of the airfield, stopped, swung round, and caught fire. A passenger in the aircraft died from injuries caused by the fire. In an action for damages in respect of his death against the captain and second pilot of the aircraft, they both admitted negligence, and pleaded that no action lay on the ground that the injuries to the deceased were "war injuries" within the definition in s. 8, sub-s. 1, of the Personal Injuries (Emergency Provisions) Act, 1939, *viz.*, "injuries . . . (*b*) "caused by the impact on any . . . property of . . . any aircraft "belonging to . . . His Majesty . . .".

Held, that that definition did not exclude injuries to a passenger in such an aircraft, but that it was not shown that the fire or, therefore, the injuries were caused by an impact, *viz.*, a touching down by the aircraft on the airfield; that the injuries to the deceased were therefore not "war injuries"; and that the plaintiff was therefore entitled to recover damages; for an injury was "caused" by an impact within the meaning of the definition of "war injuries" in s. 8, sub-s. 1, of the Personal Injuries (Emergency Provisions) Act, 1939, only if the impact was the real or efficient cause of the injury.

Greenfield v. *London and North Eastern Ry. Co.* [1945] K. B. 89; *Adams* v. *Naylor* [1946] A. C. 543; and *Minister of Pensions* v. *Chennell* [1947] K. B. 250, considered.

Dictum of Lord Wright in *Yorkshire Dale S.S. Co. Ld.* v. *Minister of War Transport* [1942] A. C. 691, 706, applied.

Semble, the Personal Injuries (Emergency Provisions) Act, 1939, has extraterritorial operation. Therefore, war injuries sustained by British subjects outside the United Kingdom fall within its provisions.

ACTION.

The plaintiff, John Howgate, as the executor of Reginald Bousfield Lagden, deceased, a British subject, brought an action for damages under the Fatal Accidents Acts on behalf of the widow and children of the deceased, and under the Law Reform (Miscellaneous Provisions) Act, 1934, for the benefit of the estate of the deceased, against Flight Lieutenant D. R. Bagnall and Pilot Officer E. L. Hutchings, the captain and second pilot, respectively, of an aircraft which caught fire at Karachi on October 20, 1944, as a result of which the deceased, who was a passenger in the aircraft travelling under official auspices, died from injuries.

The defence was that the injuries which the deceased received were war injuries within the meaning of the Personal Injuries (Emergency Provisions) Act, 1939, and that the action could not therefore be sustained by virtue of s. 3, sub-s. 1, of that Act (1). The defendants admitted that the accident was caused by their negligence.

The following facts appeared from an agreed statement:—On October 20, 1944, the deceased was a passenger in an aircraft operated for and on behalf of His Majesty by the Royal Air Force Transport Command on a flight from England to India, in the course of which it was intended to land at Mauripur airfield, Karachi. At about 10 p.m. the aircraft touched down on a runway, but again became airborne and touched down again on rough ground. After travelling about 550 yards towards the edge of the airfield the aircraft stopped, swung round, and caught fire near the boundary of the airfield. There was evidence that an undercarriage leg had collapsed. The deceased died from asphyxiation as a result of the accident.

Scott Henderson, K.C., and *Skelhorn* for the plaintiff. The Personal Injuries (Emergency Provisions) Act, 1939, does not apply in the case of injuries suffered in India. The presumption is that an Act does not operate outside the territorial limits of the United Kingdom in the absence of an intention clearly expressed in it or to be inferred from its language: see Maxwell on the Interpretation of Statutes (9th ed.), p. 149; cited with approval by Cozens-Hardy, M.R., in *Tomalin* v. *S. Pearson & Son, Ld.* (2). In that case the *Workmen's Compensation Act*, 1906, was held, on that principle, not to apply to an accident in

---

(1) Personal Injuries (Emergency Provisions) Act, 1939, s. 3. sub-s. 1: "In respect of a war injury sustained "during the period of the present "emergency by any person . . . no ". . . damages shall be payable . . . "as . . . (*b*) would, whether by "virtue of any enactment . . . or "at common law, be payable—(i) ". . . by any person . . . on the "ground that the injury in question "was attributable to some negligence ". . . for which the person by whom "the . . . damages would be payable "is responsible".

Section 8, sub-s. 1: ". . . 'war "'injuries' means physical injuries ". . . (*b*) caused by the impact on "any . . . property of . . . any air"craft belonging to . . . His Majesty "or any allied power . . .".

(2) [1909] 2 K. B. 61, 64.

Malta. Section 7 of that Act expressly gave it a limited application abroad. There is no such provision in the Act of 1939. There is nothing whatever in it to show that it was intended to apply abroad except in Northern Ireland (s. 9, sub-s. 2). If the plaintiff had brought the action in India the defendants could not possibly have relied on the British Act of 1939.

Schemes made by the Minister of Pensions under s. 1 of the Act of 1939 envisaged that the Act had extraterritorial operation: see the Personal Injuries (Civilians) Scheme, 1939, art. 27, para. 2, by which awards might in some circumstances be made under the scheme to persons ordinarily resident in the United Kingdom notwithstanding that they were injured elsewhere, and similar provisions in later schemes. Such provisions are ultra vires. That the Minister thought that the Act had extraterritorial operation is not relevant to the question. The deceased was not entitled to a pension under the schemes. He was not ordinarily resident in the United Kingdom at the time of his death. In any event it would not follow from the fact that he was entitled to a pension that an action by him at common law would necessarily be barred by s. 3, sub-s. 1, of the Act: see *Billings* v. *Reed* (3).

The injuries to the deceased were not " war injuries " within the definition in s. 8, sub-s. 1, of the Act. The court is concerned in this case only with para. (*b*) of that definition. That paragraph does not envisage accidents to passengers. The definition could not apply if a passenger were injured by fire in the air, or fell out of the aircraft, or if the aircraft fell into the sea. The court should not give to the definition such a meaning as would result in absurdity.

[Counsel referred to Maxwell on the Interpretation of Statutes (9th ed.), pp. 207 to 214, and to *Yates* v. *Reg.* (4).]

Moreover, the injuries were not " caused " by an impact within the words of the definition. It was not shown that the negligence of the defendants (which admittedly caused the injuries) caused the impacts when the aircraft " touched down ". If a pilot touches down, and afterwards is negligent, and his negligence causes injuries, they are not " war injuries " within the definition. The defendants must show that the touching down was negligent; but they cannot do so.

Sir Walter Monckton, K.C., and *J. P. Ashworth* for the defendants. The primary purpose of the Act is to confer rights, *i.e.*, to make provision for awards in respect of war injuries. At the same time, however, the Act takes away common-law rights in respect of war injuries. If the injuries in question are war injuries s. 3, sub-s. 1, bars an action at common law whether there is a corresponding right to a pension under a scheme made under s. 1 or not.

---

(3) [1945] K. B. 11.

(4) (1885) 14 Q. B. D. 648.

The injuries to the deceased were caused by an impact of the aircraft on the airfield, and were therefore "war injuries" as defined by s. 8, sub-s. 1 (*b*). If the impact in a case such as the present is *a* cause of a war injury it "causes" the injury within the meaning of that definition. The question is whether the impact is a link in the chain of causation. It is enough to show that the impact was one of a number of concurrent causes. But for the first bad landing, in this case, at an excessive speed the aircraft would not have touched down again on rough ground, the undercarriage would not have collapsed, and the accident would not have happened. The conclusion that, but for the impact, there would have been no fire is irresistible.

[Counsel referred to *Adams* v. *Naylor* (5) and *Minister of Pensions* v. *Chennell* (6).]

There is nothing in the definition of "war injuries" in s. 8, sub-s. 1 (*b*), to exclude injuries to passengers in aircraft. Were an aircraft to fall on a house, and were a passenger in the aircraft and a person in the house both to be thereby injured, one would be injured by the impact as much as the other. There may be cases in which injuries to a passenger in an aircraft are not within the definition; but that strange results follow from the definition is no reason for not applying it.

The Act of 1939 has extraterritorial operation. It is intended to cover all subjects of His Majesty. Section 1 gives the Minister of Pensions wide powers to make a scheme providing for the making of payments in respect of war injuries; s. 3 bars the rights at common law of *any* person in respect of war injuries; and s. 8, sub-s. 1, defines "war injuries" broadly. The Act was passed in contemplation of universal war and was concerned with aircraft that would fly regularly not only in the United Kingdom but also outside it. Those points preclude a narrow construction limiting the operation of the Act to the United Kingdom. If an Act applies to British subjects, it may be construed to apply to them notwithstanding that they are outside the United Kingdom: see *Ex parte Blain, in re Sawers* (7).

That special provision was made by s. 7 of the Workmen's Compensation Act, 1906, for certain accidents occurring outside the United Kingdom strongly influenced the Court of Appeal in *Tomalin* v. *S. Pearson & Son Ld.* (8) and *Schwartz* v. *India Rubber, Gutta Percha and Telegraph Works Co. Ld.* (9) in holding that that Act did not have general extraterritorial operation. See also *Krzus* v. *Crow's Nest Pass Coal Co. Ld.* (10). [Counsel

(5) [1946] A. C. 543.
(6) [1947] K. B. 250.
(7) (1879) 12 Ch. D. 522.
(8) [1909] 2 K. B. 61.
(9) [1912] 2 K. B. 299.
(10) [1912] A. C. 590.

referred also to *Keegan* v. *Dawson* (11).] That schemes made under s. 1 of the Act of 1939 by the Minister of Pensions purported to have extraterritorial effect shows that Parliament intended the Act to have extraterritorial application. Such schemes were laid before both Houses of Parliament as required by s. 2, sub-s. 3, of the Act, and must therefore be assumed to have been assented to by Parliament.

But, even if the Act has not extraterritorial operation, s. 3, sub-s. 1, bars an action in this country. In order to found a suit in England for a wrong alleged to have been committed abroad the wrong must be of such a character that it would have been actionable if committed in England: see per curiam in *Phillips* v. *Eyre* (12).

Scott Henderson, K.C., in reply. As regards the last point the tort in the present case was a tort by English law. The Act of 1939 only bars the person injured from recovering damages. In any event the dictum cited from *Phillips* v. *Eyre* (12) is obiter. The interpretation sought to be put on it by the defendants is far too wide. [Counsel referred to *The Halley* (13).] Counsel for the defendants sought to argue that the present action was barred by s. 3, sub-s. 1, by something which ex hypothesi was not a war injury because it took place in India. That is untenable.

[On the question of causation counsel referred to *Minister of Pensions* v. *Chennell* (14) and *Greenfield* v. *London and North Eastern Railway Co.* (15).]

Cur. adv. vult.

November 3. BARRY, J., reading his judgment, stated the facts and continued: The defendants contend that the injuries which brought about the death of the deceased were "war injuries" within the definition of that term contained in s. 8, sub-s. 1, of the Personal Injuries (Emergency Provisions) Act, 1939, and that in consequence the plaintiff's claim against them founded on their negligence or breach of duty is barred by s. 3, sub-s. 1, of that Act. The sole issue for the determination of the court is whether or not that section relieves the defendants from the liability to pay damages which, on the admitted facts, would otherwise fall upon them.

Although this issue can be simply stated, it gives rise to a number of problems of considerable nicety. It must first be ascertained whether the injuries suffered by the deceased can properly be described as "war injuries" within the definition in

(11) [1934] I. R. 232.
(12) (1870) L. R. 6 Q. B. 1, 28.
(13) (1868) L. R. 2 P. C. 193.
(14) [1947] K. B. 250.
(15) [1945] K. B. 89.

s. 8, sub-s. 1, of the Act of 1939, and, if so, whether the provisions of the Act itself, or alternatively of s. 3, sub-s. 1, have any application where the injuries complained of were sustained outside the territorial limits of the United Kingdom.

[His Lordship then read the definition of "war injuries" contained in s. 8, sub-s. 1, of the Act of 1939, and continued:] On behalf of the plaintiff counsel made two distinct submissions as to the construction of these words. First, he contended that in their true meaning the words "physical injuries . . . (*b*) caused "by the impact on any . . . property of . . . any aircraft belong- "ing to . . . His Majesty or any allied power" did not include injuries sustained by a passenger in the aircraft concerned. From the logical point of view there is much that can be said in support of this construction. Looking at this definition of "war injuries" as a whole it is, I think, extremely doubtful whether the legislature had in mind the peculiar position of a passenger on a British or allied aircraft which makes impact with any property. Had the position of passengers been given any specific consideration, it is difficult to believe that no provision would have been made to mitigate some of the strange anomalies to which Mr. Scott Henderson has drawn attention. I need only mention one of them: if an aircraft fell into and made impact with the sea, which can hardly be described as "any property", the passenger or his dependants would not be entitled to a pension under a scheme made by the Minister under s. 1 of the Act, but could, if negligence or breach of duty were established, recover damages for the injuries sustained. If, on the other hand, the aircraft fell on to or made impact with the land, the property of which was vested in some subject or in the Crown, the position of the passenger or his dependants would be reversed.

It is unlikely that this and other curious results could have been intentional; but it is the duty of the court to construe the words of the definition according to their plain and obvious meaning, and it cannot do violence to the wording of a statute merely because that wording may lead to unexpected results. Section 1, sub-s. 1, of the Act provides that the Minister may make a scheme providing for the making of payments in respect of "(*a*) war "injuries sustained by gainfully occupied persons (with such "exceptions, if any, as may be specified in the scheme) and by "persons of such other classes as may be so specified". Section 3, sub-s. 1, refers to a "war injury" sustained by "any "person" and the definition of "war injuries" contains no words which expressly or by implication point to the exclusion of passengers in a British or allied aircraft.

In the face of these broad and general provisions I have come to the conclusion that the court would not be justified in importing an exception relating to passengers, which, had the legislature so intended, could so easily have been incorporated by express words. Mr. Scott Henderson drew attention to certain passages in Maxwell on the Interpretation of Statutes (9th ed.), pp. 207 to 214, and also to *Yates* v. *Reg.* (16), but I do not think that the principles there enunciated can properly be applied unless the words of the statute are capable of two reasonable interpretations, or there are compelling reasons for construing some wide and general word or words in a more restricted sense than they are capable of bearing. I find no such compelling reasons in the present case, and I am constrained to hold that a passenger who, in the true sense, suffers injury caused by the impact of the aircraft in which he is travelling on any property, falls within the provisions of the Act. I do so with less hesitation when it is recalled that, with the exception of s. 3, the Act is designed to confer benefits on injured persons rather than to deprive them of their normal legal rights. It would, I think, be difficult to argue that a person who was included among the classes specified in a scheme and who suffered injuries when an aeroplane in which he was travelling crashed into a house should be deprived of compensation merely because he was a passenger.

To establish their defence under s. 3 of the Act of 1939 it is, however, necessary for the defendants to provide affirmative proof that the deceased's injuries were in truth "war injuries", that is to say, injuries caused by the impact on any property of an aircraft belonging to His Majesty. From the wording of the definition it is clear that the injuries must be caused by the impact and not be some other mishap which was causally unconnected with the impact.

Were the deceased's injuries caused by the impact of this aircraft with the ground or with any other property? I have been unable to obtain much assistance from the authorities on this point which have been cited to me. In *Greenfield* v. *London and North Eastern Railway Company* (17) the Court of Appeal took the view that the word "cause" as used in the definition contained in s. 8, sub-s. 1, of the Act meant, and only meant, the immediate and precipitating cause of the injury. This case was, however, decided before the decision of the House of Lords in *Adams* v. *Naylor* (18), and I respectfully agree with the view of Denning, J., in *Minister of Pensions* v. *Chennell* (19), that the authority of *Greenfield's* case has been seriously undermined by the later decision of the House of Lords. It can, I think, no longer be said that the "impact" must be the *sole* or *immediate* or *precipitating* cause of the injuries. Other causes may also operate to bring about the injuries but, nonetheless, the impact must of itself be a real and effective cause. It is not a

(16) 14 Q. B. D. 648.
(17) [1945] K. B. 89.
(18) [1946] A. C. 543.
(19) [1947] K. B. 250.

real and effective cause if it is nothing more than an event or circumstance on which the true causes either previously or subsequently operate.

In considering the causal nature of any event it is, I think, essential to bear in mind the words of Lord Wright in *Yorkshire Dale Steamship Company Ld.* v. *Minister of War Transport* (20): "The choice of the real or efficient cause from out of the whole "complex of the facts must be made by applying common-sense "standards". The same principle, in my judgment, applies where considering whether any one event is or is not one of the real or efficient causes of another.

Before this question can be answered it is necessary to examine the facts of this unhappy accident. The evidence, and the only evidence, concerning them is contained in an agreed statement of facts submitted to me by the parties.

[His Lordship read the relevant passages from the agreed statement as set out above, and continued:] On any reasonable interpretation of the word "impact", it seems to me that the only "impacts" which are disclosed by this evidence are those which occurred on the two occasions when the aircraft "touched "down", once upon the runway and once upon the rough ground beyond it. There is nothing, as I see it, to suggest that either of these impacts had any relationship whatever to the final catastrophe, other than a merely historical one; they were the means by which the aircraft reached the ground. It is true that the aircraft was in fact on the ground when it caught fire; but that does not mean that its being on the ground, or that the impact as a result of which it reached the ground, were *causes* of the fire in any legal or logical sense. A pedestrian who is knocked down by a motor car when crossing a street would not have been knocked down unless he had opened his front door that morning and walked out of his house. No one could, however, suggest that the opening of the front door was an event which had any *causal* connexion with the accident. He might equally well have been run down if he had been walking the streets and sleeping out for several days. Similarly, the accident which caused the deceased's death might as easily have occurred if the aircraft had been starting its flight and had overrun the runway without even leaving the ground or making impact with it.

In my opinion, there is no evidence which establishes exactly why this disaster took place, other than the admitted fact that it was due to the negligence of the defendants. The aircraft was, no doubt, travelling at an excessive speed after landing, and this excessive speed, coupled with the rougher ground over which it was travelling may have caused the collapse of an undercarriage leg; but this is pure conjecture. The excessive speed of the aircraft may equally well have caused some other mishap, and there is nothing to establish why the aircraft was travelling too fast. This may have been caused by some misjudgment of its landing speed, or it may have resulted from some negligence on the part of the pilot, or from some failure in the control mechanism after the aircraft had finally touched down and was in contact with the earth. Whatever be the true explanation of the accident, I can see nothing in the evidence to suggest—and still less to establish—that an impact with the ground, or with any other property, was an effective cause of the aircraft's swinging round or catching fire.

---

(20) [1942] A. C. 691, 706.

In these circumstances, I am bound to find that the defendants have failed to prove that the injuries to and death of the deceased were caused by the impact on any property of an aircraft belonging to His Majesty and that, in consequence, his injuries were not " war injuries " within the definition contained in s. 8, sub-s. 1, of the Act of 1939. The provisions of s. 3 of the Act are therefore inapplicable and the plaintiff is entitled to enforce his ordinary legal rights on behalf of the dependants and the estate.

This finding disposes of the case, save as to the amount of damages which should be awarded, but, out of deference to the arguments presented, I think it right to refer to one other major issue which was fully debated at the trial.

Mr. Scott Henderson contended that the Personal Injuries (Emergency Provisions) Act, 1939, had no extraterritorial application, and that injuries sustained outside the United Kingdom did not fall within any of its provisions. He based this argument on the broad proposition set out in Maxwell (9th ed.), p. 149: " In the absence of an intention clearly expressed or " to be inferred either from its language, or from the object, " subject-matter, or history of the enactment, the presumption " is that Parliament does not design its statutes to operate " beyond the territorial limits of the United Kingdom ".

This passage, which is well supported by authority, was cited with approval by Cozens-Hardy, M.R., in *Tomalin* v. *S. Pearson & Son Ld.* (21), when the Court of Appeal applied this principle to the Workmen's Compensation Act, 1906. *Tomalin's* case (21) was followed in *Schwartz* v. *India Rubber, Gutta Percha and Telegraph Works Co. Ld.* (22).

These two decisions of the Court of Appeal have been criticized in *Keegan* v. *Dawson* (23), but they are, of course, binding on me; and *Tomalin's* case was cited with approval by

(21) [1909] 2 K. B. 61, 64.
(22) [1912] 2 K. B. 299.
(23) [1931] I. R. 232.

1950

HOWGATE
v.
BAGNALL.

Barry, J.

the Privy Council in *Krzus* v. *Crow's Nest Pass Coal Co. Ld.* (24). They have, however, no direct bearing on the construction of the Act now under consideration, more especially as the Court of Appeal, in arriving at their decisions, were strongly influenced by certain provisions contained in s. 7 of the Workmen's Compensation Act, 1906, which have no counterpart in the Personal Injuries (Emergency Provisions) Act, 1939.

Were it material to the decision of the present case, I should have felt bound to accede to the submission of counsel for the defendants that the general scheme of the Act of 1939 and the conditions of universal war which existed, or seemed likely to exist, at the time when it was passed, all tend to show that its application is not to be confined to the narrow territorial limits of the United Kingdom. I think that the Act applies to all British subjects who suffer " war injuries " within the meaning of the definition, in any part of the globe. Counsel for the plaintiff pointed out that this construction of the Act might enable a British subject resident in the United States of America to recover compensation if he were injured by the impact of an American aircraft. If this were so, it would perhaps throw some doubt on the construction that I have indicated; but in my judgment Parliament has provided against any such absurdities by enabling the Minister to specify in his scheme the classes of persons entitled to benefit under it.

In fact various schemes made under the Act have imposed stringent limitations on the classes of persons who may obtain awards of compensation for injuries sustained outside the United Kingdom.

I cannot, of course, have recourse to these schemes as a guide to the correct interpretation of the Act under which they were made, but I am, I think, entitled to consider them for certain limited purposes. In *Billings* v. *Reed* (25) Lord Greene, M.R., said, in reference to a scheme made under the Act: " The fact " that the object of this Act was in substance what I have " suggested can be seen from a consideration of the way in which " the scheme has been formed pursuant to the Act itself and " with the tacit approval of Parliament as provided in the Act. " At any rate, we are entitled to look at the scheme for the " purpose of seeing the kind of practical treatment of these " questions which Parliament has authorized ".

It is abundantly clear from the wording of the various schemes made under the Act that the Minister, with the tacit consent of Parliament, has throughout considered that " war injuries " may be sustained outside the United Kingdom, and counsel for the plaintiff has been forced to contend that, if his submission is

(24) [1912] A. C. 590.

(25) [1945] K. B. 11, 17.

correct, all these schemes have contained many provisions that were ultra vires. As already indicated, I cannot accept this view.

Finding as I do that the Act of 1939 applies to "war "injuries" sustained by British subjects outside the United Kingdom it is unnecessary for me to consider an alternative submission made by counsel for the defendants that, irrespective of the territorial application of the Act, this action was in any event barred by s. 3, sub-s. 1, on the ground that the event which caused the deceased's injuries was not actionable in this country. I am, however, very far from being convinced that the defendants could have availed themselves of this section if the deceased's injuries had not been "war injuries" to which the Act applied.

His Lordship then considered the question of damages. He awarded 17,000*l*. damages under the Fatal Accidents Acts and 300*l*. under the Law Reform (Miscellaneous Provisions) Act, 1934.

Judgment for the plaintiff.

Solicitors: *Maxwell, Batley & Co.; Treasury Solicitor.*

R. P. C.

PEARSON *v.* ROSE & YOUNG LD. (OTHERS THIRD AND FOURTH PARTIES).

C. A.

1950
Oct. 17, 18;
Nov. 1.

Somervell and Denning, L.JJ., and Vaisey, J.

Principal and agent—Factor—Mercantile agent—Second-hand motor car —Agent alleged to have obtained car by larceny by a trick—Registration book also obtained without consent of owner—Sale of car with book to bona fide purchaser—Purchaser's title—Factors Act, 1889 (52 *&* 53 *Vict. c.* 45), *s.* 2, *sub-s.* 1.

A mercantile agent when selling a second-hand motor car cannot sell the car "in the ordinary course of business of a mercantile "agent" within the meaning of sub-s. 1 of s. 2 of the Factors Act, 1889, unless he sells the registration book with the car, and a purchaser buying the car from him without the registration book will not obtain a good title to the car under that Act; and if he buys the car with the book he must prove that both the car and the book were in possession of the mercantile agent with the consent of the owner.

The plaintiff, the owner of a motor car, gave to a motor car dealer, admittedly a mercantile agent, possession of his car to see what offers could be obtained for the sale of it when a new car, which he had ordered through the agent, should be delivered to him. The car was thus left with the agent provisionally in his capacity as a salesman. Later in the day, the agent, who had decided to sell the car and misappropriate the proceeds, when in conversation with the plaintiff, had in his hands the registration book of the car. He thereupon induced the plaintiff to leave in haste on a bogus errand, so that the plaintiff forgot that he had left the custody of the registration book in the hands of the agent who thus obtained possession of the book by a trick. On the same day the agent sold the car with its registration book to a person who bought it in good faith.

Held, that, as the ostensible authority which would enable a person to sell a second-hand motor car in the ordinary course of business arose from his possession of the registration book, the sale of a second-hand motor car, without its registration book would not be in the ordinary course of business; and that accordingly, "the goods" in the present case sold within the meaning of s. 2, sub-s. 1, of the Factors Act, 1889, were the car, together with its registration book; but that, since the registration book was not in the possession of the agent with the consent of the owner, the purchaser, by virtue of that sub-section, obtained no good title to the car.

Per curiam: On the basis that the agent obtained possession of the car by larceny by a trick, the agent having an animus furandi at the moment when he received possession of it, nevertheless he was in possession of the car "with the consent of the owner", within the meaning of the sub-section.

On this issue the views of Bankes and Scrutton, L.JJ., expressed in *Folkes* v. *King* [1923] 1 K B. 282, at pp. 296–8 and 305–7, preferred to those of the court (Sir Gorell Barnes, P., Fletcher Moulton and Kennedy, L.JJ.) in *Oppenheimer* v. *Frazer and Wyatt* [1907] 2 K. B. 50, and of Atkin, L.J., in *Lake* v. *Simmons* [1926] 2 K. B. 51.

Decision of Devlin, J., reversed.

APPEAL from Devlin, J.

The plaintiff was the owner of a 1948 Morris Ten motor car which he had bought, when new, on February 6, 1948, under the usual covenant not to resell for a year. In 1949 he wished to obtain a new car, because he could then sell the Morris for more than he had given for it. One Hunt was the managing director of Reliance Motor Haulage Contractors Ld., who held themselves out as dealers in new and used cars and also as repairers. Hunt therefore, acting on their behalf, was admittedly a mercantile agent. Mrs. Hunt, who was a customer of the plaintiff, a retail tobacconist, had suggested to him that her husband could get him a new car.

On March 15, 1949, the plaintiff, in company with one Bristowe, saw Hunt, who said that he could get for the plaintiff an Austin A.40 in six or seven months for 467*l.*, but that he would require a deposit of 100*l.* On March 17 there was another interview at Hunt's premises, the same persons being present. The plaintiff agreed to buy the Austin and paid to Hunt the deposit of 100*l.* According to the evidence of the plaintiff, Hunt said that the plaintiff's Morris Ten was no good to him and there was some discussion as to Hunt's undertaking certain minor repairs to it. The plaintiff's evidence was that there was no question of Hunt's selling the car for him in part exchange or at all.

It was common ground that on March 18, 1949, the plaintiff took his Morris to the premises of the Reliance Motor Haulage Contractors Ld. and left it there. The plaintiff's evidence, supported by Bristowe, the only oral evidence, was that he left the car there solely for the purposes of repair. When the plaintiff arrived on March 18, having left his car on the premises, he waited for an hour and a half before he was able to see Hunt. At some stage the car was driven into the showroom and left there. At the interview between the plaintiff and Hunt the question whether the Morris was free of the covenant or not was discussed. The plaintiff had taken the registration book, with petrol coupons attached, from the pocket of the Morris car, where he kept it. He produced the book to clear up the point about the covenant and in connexion with the question of petrol allowance.

Whilst Hunt had the registration book in his hand, the plaintiff said, a message came for him that Hunt's wife was outside the office in a distressed condition. Hunt then asked the plaintiff to leave the office, so that he could see Mrs. Hunt, and ten minutes later Hunt came outside and told the plaintiff that Mrs. Hunt had to have an operation and must go to hospital. He asked the plaintiff if he would be kind enough to go round in a car with Mrs. Hunt to the hospital. The plaintiff complied, forgetting that he had left the registration book with Hunt.

After he had left, Hunt, on that day, sold the car with the registration book to the fourth party, one Marshall, a motor-car dealer, for 450*l.* Marshall sold the car on March 21, 1950, to the third party for 620*l.*, who on March 25 sold it to the defendants, Rose & Young Ld., for 650*l.* Shortly afterwards Hunt was convicted of frauds in connexion with this Morris Ten and also other motor cars.

The plaintiff, finding his Morris car in the possession of the defendants, demanded it from them, and, on their refusal to deliver it, sued them in detinue and conversion. The defendants added the third, who brought in the fourth, party. The fourth party pleaded that he had bought the car in good faith and relied on s. 2, sub-s. 1, of the Factors Act, 1889 (1), as affording him a good title to the car.

Devlin, J., did not accept the plaintiff's evidence, supported by that of Bristowe, that he had left the car with Hunt solely for the purpose of having repairs done to it. He was satisfied, he said, that the plaintiff did not instruct Hunt to sell it, if he could, forthwith; but he thought that the car was left with Hunt to see what offers would be made, on the basis that, when the new car should be available, Hunt would be the person through whom the Morris would be sold. The car was left with Hunt provisionally in his capacity as salesman. He found that Hunt meant to sell the Morris car and to misappropriate the proceeds, and that since he knew that he could not get the registration book into his possession by fair means, he tricked the plaintiff out of it. There was an issue at the trial whether the fourth party who, admittedly, had paid Hunt a low price for the car, had acted in good faith. On this issue Devlin, J., found in favour of the fourth party, and this finding was not challenged in the Court of Appeal.

The sole issue in law was whether the fourth party obtained a good title to the Morris Ten motor car under s. 2, sub-s. 1, of the Factors Act, 1889. Devlin, J., held that he did, and dismissed the plaintiff's action.

The plaintiff appealed.

Cartwright Sharp, K.C. and *F. Mattar* for the plaintiff. On the sole evidence before Devlin, J., that of the plaintiff and his friend Bristowe, the Morris Ten motor car was not entrusted to Hunt as a mercantile agent, but merely in order that his company should carry out certain minor repairs to the car. It was not entrusted to Hunt as an agent for sale. No doubt Hunt was a mercantile agent, but he and his company were also repairers of motor cars: see *Cole* v. *North Western Bank* (2), and the judgment of MacKinnon, J., in *Staffs Motor Guarantee Ld.* v. *British Wagon Co., Ld.* (3).

Secondly, if the finding of the trial judge can stand, that provisionally the car was left in the hands of Hunt in his capacity as salesman, Hunt did not obtain possession of this car with the consent of the plaintiff, the owner: he obtained possession of it by larceny by a trick. That being so, there was no consent by the plaintiff to Hunt's possession of the car: see the view of the court (Sir Gorell Barnes, P., Fletcher Moulton and Kennedy, L.JJ.) in *Oppenheimer* v. *Frazer and Wyatt* (4), and of Atkin, L.J., in *Lake* v. *Simmons* (5). There is no decision in point, and Bankes and Scrutton, L.JJ., expressed the contrary opinion in *Folkes* v. *King* (6). It is submitted that the view of the court in *Oppenheimer's* case (4) should be preferred. As Fletcher Moulton, L.J., said in that case (7): "A mercantile "agent is as capable of stealing as any other man, and, if he has "stolen the goods, there can be no question, in my opinion, "that he must be taken to hold possession of them without the "consent of the owner". See also the judgment of A. L. Smith, L.J., in *Cahn* v. *Pocketts Bristol Channel Steam Packet Co. Ld.* (8), where he said: "Now the bill of lading was not "obtained by Pintscher from Steinmann & Co. by any trick or "device, in which case it could not, I think, be said that "Pintscher had obtained the actual custody of it with Steinmann "& Co.'s consent". The question there at issue was the obtaining of a good title under s. 25, sub-s. 2, of the Sale of Goods Act, 1893. As Collins, L.J., said there (9): "However "fraudulent the person in actual custody may have been in "obtaining the possession, provided it did not amount to larceny "by a trick . . . he can by his disposition give a good title to "the purchaser". See also the judgments of Vaughan Williams, Buckley and Kennedy, L.JJ., in *Whitehorn Brothers* v. *Davison* (10). All the dicta except those in *Folkes* v. *King* (11), agree that, where a mercantile agent obtains goods by means of larceny by a trick, he is not in possession of them with the consent of the owner. Atkin, L.J., in *Lake* v. *Simmons* (12), with the views of Bankes and Scrutton, L.JJ., in *Folkes* v. *King* (13) before him, preferred that of the court in *Oppenheimer's* case (14). Lord Sumner in *Lake* v. *Simmons* (15), when the case reached the House of Lords, set out the two divergent views, but expressed no opinion on the issue.

---

(1) The Factors Act, 1889, s. 2, sub-s. 1: "Where a mercantile agent "is, with the consent of the owner, "in possession of goods . . . any "sale . . . or other disposition of the "goods, made by him when acting in "the ordinary course of business of a "mercantile agent, shall . . . be as "valid as if he were expressly autho"rised by the owner of the goods to "make the same; provided that the "person taking under the disposition "acts in good faith, and has not "at the time of the disposition notice "that the person making the disposi"tion has not authority to make the "same".

(2) (1875) L. R. 10 C. P. 354.

(3) [1934] 2 K. B. 305, 313.

Again, in *Lowther* v. *Harris* (16), Wright, J., said (17): "But "a fraud of that character, such as not to amount to larceny

---

(4) [1907] 2 K. B. 50.

(5) [1926] 2 K. B. 51.

(6) [1923] 1 K. B. 282, 296–8, 305–7.

(7) [1907] 2 K. B. 50, 71.

(8) [1899] 1 Q. B. 643, 654.

(9) Ibid. 659.

(10) [1911] 1 K. B. 463, 475, 479, 485.

(11) [1923] 1 K. B. 282.

(12) [1926] 2 K. B. 51, 71–2.

(13) [1923] 1 K. B. 282.

(14) [1907] 2 K. B. 50.

(15) [1927] A. C. 487, 509–10.

(16) [1927] 1 K. B. 393.

(17) Ibid. 401.

C. A.
1950

PEARSON
v.
ROSE &
YOUNG LD.

" by a trick, does not vitiate the consent of the owner to the " agent's possession ". Sub-s. 1 of s. 2, of the Factors Act, 1889, supersedes and reproduces in altered language ss. 2 and 4 of the Factors Act, 1825, and s. 4 of the Factors Act, 1842. It no longer requires the goods to be " entrusted " to the agent, but it suffices that they are in his possession with the owner's consent. One does not entrust a thing to a man, unless it is done with real consent. For this issue, the difference in the wording of the sections is immaterial.

Further, it is plain that there was no consent by the plaintiff to Hunt's possession of the registration book. The plaintiff was tricked out of the book and he had no intention of handing even its custody to Hunt. But what was sold to the fourth party was the car with the registration book; together they were " the " goods " sold. To sell a second-hand car without its registration book, which, although not a document of title, is the best evidence of title to the car, is not a sale " in the ordinary course " of business ". But the plaintiff never consented to Hunt's having possession of the registration book. Accordingly, neither the fourth party, nor the subsequent purchasers from him, can rely on s. 2, sub-s. 1 of the Factors Act, 1889, to give them a good title to the car.

Weitzman for the defendants, the third party and the fourth party. The plaintiff's evidence was that he left the car in the possession of Hunt solely for minor repairs. That evidence the trial judge said that he did not accept; and he found that the car was left with Hunt for the purpose of his obtaining offers to purchase it, which he could accept when he received possession of the plaintiff's new car, since the plaintiff required the use of his car in his business as a retail seller of tobacco. In support of his finding, he pointed out that the plaintiff's conversation with Hunt on March 18, 1949, when the registration book was produced, was about the question whether the covenant not to sell the Morris Ten was still binding and what was the actual mileage the car had covered—matters which had nothing to do with minor repairs to the car.

In *Fuentes* v. *Montis* (18), Willes, J., said: " It appears to " me that the Factors Acts will be fully satisfied by holding the " effect of them to be, that a man who places goods, or the docu- " ments of title to goods, in the hands of an agent for sale, *or* " *for a purpose connected with sale*, shall be taken to have given " the agent authority to pledge ". And the customer of a mercantile agent gets a good title to the goods which he has bought from him, notwithstanding that the goods were in fact entrusted to the agent on the condition that no offer should be accepted until the owner was referred to, or unless a particular price was obtained: see *Turner* v. *Sampson* (19) and the judgment of Channell, J., in that case on the alteration of the law effected by the Act of 1889 (20). He there said: " At the present " time if a person carried on a business in which it was in the " ordinary course for persons who carried on that business to " have authority to sell, and if some one entrusted his goods to " such person, he was bound by his acts ".

---

(18) (1868) L. R. 3 C. P. 284.

In *Moody* v. *Pall Mall Deposit and Forwarding Co., Ld.* (21), Lord Coleridge, J., pointed out that the words " entrusted " for sale " in s. 2 of the Factors Act, 1877, were replaced in s. 2, sub-s. 2 of the Act of 1889, by the words " in the possession " of the agent ". The object was to make the Act apply to such goods—" all goods which were in the custody of the agent, " whether for sale or not ".

[SOMERVELL, L.J. Has that decision ever received judicial comment?]

Apparently not.

The second point taken for the plaintiff was that Hunt obtained the Morris Ten, animo furandi—by larceny by a trick. There is no express finding by Devlin, J., to that effect.

[SOMERVELL, L.J. Your difficulty there is that the judge found that Hunt meant to sell the car and to misappropriate the proceeds and that, since he knew that he could not get the registration book into his possession by fair means, he tricked the plaintiff out of it.]

The question is whether Hunt had the animus furandi when the car came into his possession. There is no finding on that issue. If he had not, this was not larceny by a trick. It is submitted that the car and the registration book have to be considered quite separately. There was nothing to prevent Hunt from selling the car separately without the registration book.

[DENNING, L.J. I am not sure that the relevant " goods " to be considered under the sub-section are not the car plus the registration book.]

[VAISEY, J. Possession of the car passed when the plaintiff left Hunt's premises, and at that time Hunt had obtained the custody of the registration book by a trick.]

Had there been no evidence as to the obtaining of the registration book, it is clear, it is submitted, that the sale of the car would have been in the ordinary course of business within the meaning of the sub-section.

---

(19) (1911) 27 T. L. R. 200.
(20) Ibid. 202.
(21) (1917) 33 T. L. R. 306.

C. A.
1950

Pearson
v.
Rose &
Young Ld.

[Denning, L.J. There was no consent on the part of the plaintiff to Hunt's retaining possession of the registration book. Does not that throw a flood of light on the question of the plaintiff's consent in the case of Hunt's possession of the car?]

It does not conclude the matter. The facts and the judgment of the judge are consistent with the case being one of larceny by a bailee.

If that is wrong, and there was larceny by a trick, the difference in judicial opinion should be resolved by adopting that of Bankes and Scrutton, L.JJ., in *Folkes* v. *King* (22), to the effect that where the plaintiff has, in fact, consented to the mercantile agent's having possession of the car, it is immaterial whether the agent, in obtaining possession of it, committed larceny by a trick. In fact the plaintiff consented to Hunt's having possession of the car, and the legal fiction of the criminal law is not here in point. Porter, J., in *Lloyds Bank Ld.* v. *Bank of America National Trust and Savings Association* (23), said: "One of the objects of the Factors Act, 1889, was to enable a "mercantile agent entrusted with goods to give a good title by "way of sale or pledge, notwithstanding that he had, in fact, "no authority to do the act which he purported to perform. "Those acts made the entrusting of the goods to the mercantile "agent a kind of statutory holding out by the owner of the "goods of authority on the agent to deal with them, as if he were "the owner".

The fourth party and those who subsequently brought this car obtained a good title to it by virtue of s. 2, sub-s. 1, of the Factors Act, 1889.

Cartwright Sharp, K.C., replied.

Cur. adv. vult.

Nov. 1. The following judgments were read:

Somervell, L.J. If this Morris Ten motor car had been handed over to Hunt solely for the purpose of his effecting repairs to it, Mr. Cartwright Sharp submitted that the Factors Act, 1889, did not apply to this case: the mercantile agent must obtain possession of "the goods" as a mercantile agent and not in some other capacity. He relied on the reasoning in *Cole* v. *North Western Bank* (24). In finding that the car was left with Hunt primarily in his capacity as a salesman, the trial judge relied on various matters. Perhaps the most important is based on what happened on March 18. The plaintiff said that he waited an hour and a half in order to ask Hunt how long the repairs would take. On the plaintiff's story one would have expected him to have found this out on March 17, before driving his car the very considerable distance to Hunt's premises. He used the car in his business and would have wanted to know how long it would be away before deciding to drive it round. When he does get to see Hunt there is no evidence as to any conversation as to how long the repairs would take, but the plaintiff admitted that there was a discussion as to whether the car had only done 4,000 miles. This was, of course, quite irrelevant if Hunt was not to be concerned then or later with the sale of the car and the car was there for repairs only.

---

(22) [1923] 1 K. B. 282.
(23) [1937] 2 K. B. 631, 638.
(24) (1875) L. R. 10 C. P. 354.

I appreciate the force of Mr. Cartwright Sharp's submission that the only oral evidence was that of the plaintiff and Bristowe, who supported the plaintiff's account of the conversations. But when a court is satisfied that the evidence before it does not accord with admitted facts, it must do its best to draw inferences as to what actually took place. The judge referred to the fact that there was no repair shop. I myself think it is reasonable to conclude on the evidence that the repairs were done before the fourth party bought the car, and that there was a mechanic on the premises. Admittedly, however, the car was left in the showroom of a motor dealer. This, I think, places a burden on the plaintiff of satisfying the court that it was left there for repairs only, and I agree with the trial judge that, on all the facts, the plaintiff has failed so to satisfy the court.

On the findings made by Devlin, J., Mr. Cartwright Sharp submitted that the only possible conclusion was that the car was obtained by larceny by a trick. On that basis there are conflicting opinions as to whether s. 2, sub-s. 1, of the Factors Act can or cannot apply. Mr. Cartwright Sharp submitted it could not. I will refer to this later because I have come to the conclusion that the appeal succeeds on the judge's findings irrespective of that point.

It is, I think, clear that, in the sale of a second-hand car, the vendor will ordinarily deliver and the purchaser require the delivery of the registration or log book. Mr. Cartwright Sharp stated, and I accept it, that he did not contend that cars could not be sold without their registration books; but the price would be substantially reduced thereby. This, I think, shows, and I hold, that a sale of a car without its registration book would not be a sale, within the words of the sub-section, "in the ordinary "course of business". The judge's findings as to Hunt's reasons for getting hold of the registration book support this view.

The transaction which the fourth party seeks to uphold is the sale of a car with its registration book, a more valuable subject-matter than a car without its registration book. Hunt, as it seems to me, was never in possession of the registration book with the consent of the plaintiff. The matter can be thus tested:

if, immediately after the plaintiff had left the building, he had been asked: "did you mean to leave your car?", he would have answered "Yes". If he had been asked: "did you mean to leave your registration book?", he would have answered "No", and would have gone back and collected it. The ostensible authority which enabled Hunt to effect a sale "in the ordinary "course of business" arose because of his possession of the registration book without the consent of the owner. The relationship of the registration book, which is of course not a document of title to a motor car, is one to which no useful analogy has occurred to me. I am, however, of opinion that on the conclusions as set out above, the fourth party cannot claim the protection of the Factors Act, 1889. In cases of larceny by a trick, the person defrauded does in one sense consent to the possession of the thief. So far as the registration book is concerned, for the reasons I have given the plaintiff never consented to Hunt's having possession of it.

The issue with regard to larceny by a trick was fully argued before us. I will deal with it, because if there was larceny by a trick of the goods sold, and this prevents the Factors Act, 1889, applying, the appeal would succeed in any event. I accept Mr. Cartwright Sharp's submission that, on the judge's findings, there is only one possible conclusion, that the possession of the car was obtained by larceny by a trick. The law as to larceny by a trick is fully set out in the judgment of Bankes, L.J., in *Folkes* v. *King* (25). It seems to me clear that Hunt had an animus furandi at the time he got possession of the car and that the other conditions are fulfilled. The plaintiff clearly did not intend to pass the property, nor on the judge's findings did he authorize Hunt to conclude a sale.

The question whether this necessarily excludes a purchaser from the protection of the Factors Act, 1889, has been considered in more than one case, but there is no clear decision on the point. In *Folkes* v. *King* (25) Bankes and Scrutton, L.JJ., considered the point. Bankes, L.J., said (26): "The question is whether, "assuming that Hudson was guilty of larceny of the car, that "fact renders it impossible that anyone can have obtained a title "to the car from Hudson under the Factors Act; the argument being that no one can under those circumstances prove "the owner's consent to the car being in Hudson's possession. "The argument against this view was admirably put by Mr. J. A. "Hamilton (as he then was) in *Oppenheimer* v. *Frazer and* "*Wyatt* (27), but it was expressly rejected by every member of "the court. The view taken by the court in that case as to the

(25) [1923] 1 K. B. 282, 291-3.
(26) Ibid. 296.
(27) [1907] 2 K. B. 50, 54.

"want of bona fides on the part of the purchaser of the goods "rendered it unnecessary to decide the point, and the opinions "of the members of the court are therefore, I think, strictly "speaking obiter and not binding upon us. They deserve, how"ever, to be treated with the greatest respect, and it is only "because I am unable after full consideration to agree with them "that I venture to differ from the conclusion at which they "arrived".

In *Oppenheimer* v. *Frazer and Wyatt*, Fletcher Moulton, L.J., said (28): "A mercantile agent is as capable of stealing as "any other man, and, if he has stolen the goods, there can be "no question, in my opinion, that he must be taken to hold "possession of them without the consent of the owner. One of "the recognized methods of stealing at common law is distin"guished from other types of larceny, and called larceny by a "trick, but it is in the eye of the law pure stealing".

With regard to the consent required for the Factors Acts, Bankes, L.J., said in *Folkes* v. *King* (29): "What the section "refers to is the consent of the owner. To establish a consent "it is no doubt necessary to consider what the state of mind of "the owner of the goods was with reference to the possession of "them by the mercantile agent". Scrutton, L.J., after referring to the earlier cases, said (30): "First on the question whether "to prove larceny by a trick is a defence to the Factors Act as "excluding consent of the true owner. I can understand that "where by a trick there is error in the person, there is no true "consent and the Factors Act is excluded. But where there is "agreement on the person and the true owner intends to give "him possession, it does not seem to me that the fact that the "person apparently agreeing to accept an agency really means "to disregard the agency, and act for his own benefit, destroys "the consent of the true owner under the Factors Act. That "Act intended to protect a purchaser in good faith carrying out "an ordinary mercantile transaction with a person in the position "of a mercantile agent. It does not do so completely, for it "requires the purchaser to prove that the goods were in posses"sion of the mercantile agent 'with the consent of the owner'. "But it does not require the purchaser in addition to prove that "the mercantile agent agreed both openly and secretly, ostensibly "and really, to the terms on which the owner transferred posses"sion to the mercantile agent. It appears to me to be enough "to show that the true owner did intentionally deposit in the "hands of the mercantile agent the goods in question. It is "admitted that if he was induced to deposit the goods by a "fraudulent misrepresentation as to external facts, he has yet

(28) [1907] 2 K. B. 50, 71.
(29) [1923] 1 K. B. 282, 297.
(30) Ibid. 305.

"consented to give possession, and the Factors Act applies, but "it is argued that if he deposits the goods in the possession of "an agent who secretly intends to break his contract of agency "the Factors Act does not apply. I do not think Parliament "had any intention of applying the artificial distinctions of the "criminal law to a commercial transaction, defeating it if there "were larceny by a trick, but not if there were only larceny by "a bailee, or possession obtained by false pretences". I have set out these passages at some length because I agree with the conclusion and the reasons given for it and do not desire to add to them.

Atkin, L.J., in *Lake* v. *Simmons* (31), in a dissenting judgment, expressed his preference for the opinions expressed in *Oppenheimer* v. *Frazer and Wyatt* (32) as against those expressed by Bankes and Scrutton, L.JJ., in *Folkes* v. *King* (33). The Court of Appeal's decision in *Lake* v. *Simmons* (31) was reversed in the House of Lords on a different point (34). Lord Sumner referred to and set out the two divergent views without expressing an opinion (35). As the issue was fully argued before us, and as opinions have already been expressed, I thought it right to set out the conclusion to which I have come.

For the reason which I gave earlier in my judgment, I think the appeal succeeds.

DENNING, L.J. In the early days of the common law the governing principle of our law of property was that no person could give a better title than he himself had. But the needs of commerce have led to a progressive modification of this principle so as to protect innocent purchasers. We have had cases in this court quite recently about sales in market overt and sales by a sheriff; and now we have the present case about sales by a mercantile agent. The cases show how difficult it is to strike the right balance between the claims of true owners and the claims of innocent purchasers. The way that Parliament has done it in the case of mercantile agents is this: Parliament has protected the true owner by making it clear that he does not lose his right to goods when they are taken from him without his consent, as for instance when they have been stolen from his house by a burglar who has handed them over to a mercantile agent. The true owner can in that case claim them back from any person into whose hands they came, even from an innocent purchaser who has bought from a mercantile agent. But Parliament has not protected the true owner, if he has himself consented to a mercantile agent having possession of them: because, by leaving

---

(31) [1926] 2 K. B. 51, 71–2.
(32) [1907] 2 K. B. 50.
(33) [1923] 1 K. B. 282.
(34) [1927] A. C. 487.
(35) Ibid. 509–10.

C. A.
1950

PEARSON
v.
ROSE &
YOUNG LD.

Denning, L.J.

them in the agent's possession, he has clothed the agent with apparent authority to sell them; and he should not therefore be allowed to claim them back from an innocent purchaser.

The critical question, therefore, in every case is whether the true owner consented to the mercantile agent having possession of the goods. This is often a very difficult question to decide. There are three points of principle which arise for consideration in the present case:—

(1.) If the goods are stolen from the true owner by the mercantile agent, does that mean that the owner did not consent to the mercantile agent having possession of them? At first sight the answer seems to be obvious: No man ever consents to the theft of his goods. But therein lurks a fallacy. There are many cases of larceny where the true owner consents to the thief having possession of the goods, but not to his stealing them. For instance, if the true owner allows the agent to have the goods on hire or for repair, and the agent later on makes up his mind to steal them and does so, either by breaking bulk (common law), or by converting them to his own use (statute), the agent is guilty of larceny as a bailee; but the true owner undoubtedly consented to his having possession of them. Now take the same instance where the owner lets the agent have the goods on hire or for repairs, but, with this difference, that the agent from the very beginning intended to steal the goods, then on all the authorities the agent is guilty of larceny by a trick, but the owner undoubtedly consented to his having possession of them. His state of mind is the same in both instances. He consented to the possession but not to the theft of the goods. In my opinion, therefore, the fact that the agent is guilty of larceny by a trick does not prevent the operation of the Factors Act, 1889, any more than the fact that he has been guilty of larceny as a bailee. I find myself in full agreement with the judgments of Bankes and Scrutton, L.JJ., in *Folkes* v. *King* (36), and I see nothing to the contrary in the judgment of Lord Sumner in *Lake* v. *Simmons* (37).

(2.) If the true owner was induced to part with the goods by some fraud on the part of the mercantile agent, does that mean that he did not consent to the mercantile agent having possession of them? Again the answer at first sight seems obvious: A consent obtained by fraud is no consent at all, because fraud negatives consent. The effect of fraud, however, in this, as in other parts of the law, is as a rule only to make the transaction voidable, and not void; and if therefore an innocent purchaser has bought the goods before the transaction is avoided, the true owner cannot claim them back. For instance, if a mercantile agent should induce the owner to pass the property to him by some false pretence, as by giving him a worthless cheque; or should induce the owner to entrust the property to him for display purposes, by falsely pretending that he was in a large way of business when he was not, then the owner cannot claim the goods back from an innocent purchaser who has bought them in good faith from the mercantile agent. The agent's offence may in some cases be obtaining goods by false pretences, or in other cases larceny by a trick, the difference depending on whether as a result of the fraud the owner intended to pass to the agent the property or the power to pass the property (false pretences), or only to pass the possession (larceny by trick): but in each case, whether the owner intended to pass the property or not, at any rate he consented to the agent having possession. The consent may have been obtained by fraud but, until avoided, it is a consent which enables the Factors Act, 1889, to operate: see *per* Scrutton, L.J., in *Folkes* v. *King* (38).

---

(36) [1923] 1 K. B. 282, 296–8, 305–7.

(37) [1927] A. C. 487, 509–11.

(3.) If the true owner consents to the mercantile agent having the goods for repair but not for sale, is that a consent which enables the Factors Act to operate? The answer would seem at first sight to be "Yes", because it is undoubtedly a consent to the agent having possession. But this needs testing. Suppose, for instance, that the owner of furniture leaves it with a repairer for repair, and that the repairer happens to be a dealer as well, does that mean that the repairer can deprive the true owner of his goods by selling them to a buyer? Clearly not, if the owner did not know the repairer to be a dealer; and even if he did, why should that incidental knowledge deprive the true owner of his goods? Such considerations have led the courts to the conclusion that the consent, which is to enable the Factors Act, 1889, to operate, must be a consent to the possession of the goods by a mercantile agent as mercantile agent. See *Oppenheimer* v. *Frazer and Wyatt*, *per* Channell, J. (39), and *Staffs Motor Guarantee Ld.* v. *British Wagon Co., Ld.*, *per* MacKinnon, J. (40). That means that the owner must consent to the agent having them for a purpose which is in some way or other connected with his business as a mercantile agent. It may not actually be for sale. It may be for display or to get offers, or merely to put in his showroom; but there must be a consent to something of that kind before the owner can be deprived of his goods.

If it were right to apply these considerations to the car taken by itself, without the registration book, I should find myself in full agreement with the judgment of Devlin, J. Hunt was a mercantile agent who got possession of the car with the consent of the plaintiff. It is true that Hunt was probably guilty of larceny by a trick. The plaintiff did not intend to pass the property to him or even to give him the power to pass the property; and Hunt had the animus furandi from the beginning. But that does not alter the fact that the plaintiff consented to his having possession of it. It is also true that the plaintiff intended him to repair it, but he also intended that he should act in some respects as a dealer by receiving offers from prospective purchasers. He did therefore consent to his having possession of the car as a mercantile agent.

---

(38) [1923] 1 K. B. 282, 301–2.

(39) [1907] 1 K. B. 519, 527.

(40) [1934] 2 K. B. 305, 313.

But where I do not agree with Devlin, J., is that he put the registration book on one side, as if it was of no significance in law. He seems to have thought the Factors Act, 1889, operated, if the mercantile agent had possession of the car with the consent of the true owner, even though he did not have possession of the registration book. I cannot share this view. This court has recently had to consider the position of the registration book or, as it is more commonly called, the log book, of a car: see *Bishopsgate Motor Finance Corporation* v. *Transport Brakes Ld.* (41). It is not a document of title, but it is the best evidence of title. Everyone who buys or sells a second-hand car knows that you cannot give or obtain a clean title unless you have the registration book. The instructions on every registration book tell the owner to "keep this book in a safe place, not on the "vehicle", and that "on transferring the vehicle to another "person you must hand over this book to the person acquiring "the vehicle". All sensible owners pay heed to these instructions. If the seller can produce the book showing that his title is in order, he will receive the proper market price; but no wise buyer pays his money except against delivery, not only of the car, but also of the registration book. If the seller cannot produce it, he will receive as a rule only a fraction of the proper price, because its absence is of itself notice of a defect of title. This state of affairs was foreseen by Scrutton, L.J., twenty-seven years ago. In *Folkes* v. *King* he said (42): "If the production of the "book, or if it was said to be lost, of a new one, was required "by every purchaser, it would be very difficult to find a market "for the cars which have lately been stolen in such large "numbers; and the courts may have to take adverse notice of "the conduct of a purchaser who does not require the production "of the book of registry". The courts have adopted that suggestion, and now view with suspicion any dealing in a second-hand car without a registration book.

When the significance of the registration book is realized, it becomes plain that the consent of the owner, which is necessary for the Factors Act, 1889, to operate, is a consent to the possession by the mercantile agent, not only of the car, but also of the registration book that goes with it. So long as the owner retains the registration book, the mercantile agent cannot dispose of the car in the ordinary course of his business: because it is not in the ordinary course of anyone's business to dispose of a second-hand car without a registration book. The retention by the owner of the registration book, therefore, effectually prevents the Factors Act from operating. But the handing over of the registration book with the car enables the Act to operate. The owner then clothes the agent with apparent authority to dispose of the car, and the agent is enabled to dispose of it in the ordinary course of his business, and the Factors Act, 1889, operates to give a good title to an innocent purchaser. To put it shortly, in the case of a car, "goods" in the Act means the car together with the registration book.

---

(41) [1949] 1 K. B. 322, 338.

(42) [1923] 1 K. B. 282, 300.

This brings me to the critical question in this case: Did the plaintiff consent to Hunt's having possession of the registration book as well as the car? On the findings of fact by the trial judge, the answer is clearly "No". On March 18, 1949, the plaintiff simply let Hunt have the registration book in his hands to inspect for a few moments. The plaintiff gave Hunt the barest physical custody of it whilst he was still there himself. He never consented to Hunt having possession of it. Then Hunt, by a trick, managed to get the plaintiff called away whilst he, Hunt, still held the book. Armed thus with the registration book Hunt was able to sell the car on the very same day to an innocent purchaser, which, without it, he could not have done. But on those facts the plaintiff no more consented to Hunt having possession of the registration book than if Hunt had stolen it from his pocket. The Factors Act, 1889, does not operate, therefore, to give a good title to the dealer who bought from Hunt, nor to the buyers in succession from him.

I confess that I come to this conclusion with some reluctance, because I recognize that the legislature intended the courts to make every reasonable presumption in favour of the innocent purchaser (see s. 2, sub-s. 4, of the Factors Act, 1889); but my reluctance is tempered by the reflection that in this case the buyer, Marshall, was himself a motor car dealer, who bought the car from Hunt on March 18, 1949—the same day as Hunt got it from the plaintiff—for 450*l*. and sold it on March 21, 1949, for 620*l*. A dealer whose business enables him to make quick and large profits of that kind must not be surprised if he occasionally gets his fingers burnt.

In my opinion, therefore, the appeal should be allowed.

VAISEY, J. Where there are two innocent parties of whom one has to suffer for the criminal act of a third, no decision can be said to be satisfactory. This example of that familiar problem presents to my mind considerable difficulty. On the whole, having had the advantage of reading the judgments of my Lords which have just been delivered, I share their view that this appeal should succeed. What the relationship between a motor car and its registration book or log book really is I find it extremely difficult to define. For many purposes, the book ought not to be regarded as a part of the car in the same sense as one of the car's four wheels can be so regarded. But what strikes me as decisive of the present case is the fact, already pointed out by my Lords, that a dealer in cars, being a mercantile agent, cannot, in my view, be said to be "acting in the ordinary course of his business", as such, when selling a car without its registration book, any more, in my judgment, than he would be so acting if he sold a car with only three wheels. Suppose that a car with only three of its wheels had come into the dealer's possession with the owner's consent, and that the dealer had proceeded to steal the fourth wheel from the owner's garage, had placed it on the car, and had then sold the car. In such a case, I do not think that the totality of the four-wheeled vehicle could be said to have come into the dealer's possession with the owner's consent, so as to bring into operation s. 2, sub-s. 1, of the Factors Act, 1889. When once it is admitted that the sale of a car without a registration book is not an ordinary, but a quite extraordinary, transaction on the part of a dealer in cars, I think it must follow that the transaction here is not within the protection of the section. In suggesting the imaginary case of the stolen wheel, I am well aware of the danger of analogies, and mine may be no better than most. The Act does, of course, modify and form an exception to the general law of property by conferring a title upon strangers in derogation of the rights of the true owner, and for myself I would be reluctant to extend its operation further than its terms necessitate. The appeal appears to me to be well-founded, and I have nothing further to add.

Appeal allowed. Judgment for the plaintiff against the defendants; for the defendants against the third party; and for the third party against the fourth party.

Solicitors: *Amery-Parkes & Co.; Rich and Hughes; Archibald C. Wood & Co.; Sidney Samson.*

C. G. M.

1950
July 28.

Lord Goddard, C.J.

CHEZ AUGUSTE LD. *v.* COTTAT.

Landlord and tenant—Notice to quit—Dispute whether tenancy weekly or yearly—Notice to quit purporting to terminate either—Validity.

Landlords who had twice served notice to quit on a tenant on the basis that her tenancy was weekly, and had in each case taken no further action because of her contention, and the apparent possibility, that it was yearly to March 22 each year, ultimately served on September 20, 1949, notice to the tenant to "quit and deliver "up possession of the . . . premises . . . on Monday, October 3, 1949, "or at the expiration of the current period of your tenancy, which shall expire next after the service upon you of this notice". An action brought on that notice in October, 1949, was discontinued, the tenant having stated in an affidavit that the tenancy was a yearly one. In an action for possession brought after March 22, 1950, on the same notice as determining the yearly tenancy.

Held, that, having regard to the two earlier notices to quit based on the view that the tenancy was weekly and to the fact that the proceedings originally taken on the notice of September 20, 1949, were based on the assumption that the tenancy was weekly, that notice must be construed as apt only to terminate a weekly tenancy, the expression "current period" being properly read as meaning the current period of a week; and that, as the tenancy in question was in fact a yearly one, the notice must be held invalid, notwithstanding the alternative form in which it was cast.

Mills v. *Goff* (1845) 14 M. & W. 72, applied.

ACTION.

When the plaintiff company bought premises at Old Compton Street, London, where they carried on a restaurant business, the defendant was in possession of the two upper floors. On November 14, 1946, believing that the defendant was the tenant of the upper floors and that she was holding them on a weekly tenancy, they served on her a notice to quit expiring on November 22, 1946. No action was brought on that notice because the defendant told the landlords, in reply to their inquiry what tenancy she claimed, that she held the residue of a term expiring in March, 1948. On May 13, 1948, a second notice to quit was served on the defendant, again on the basis of a weekly tenancy, but as it then transpired that it was the defendant's husband who was the tenant, he being the assignee of a lease which would expire on March 22, 1948, the rent reserved by which was £260 a year, payable in advance by equal weekly payments, the action brought on that notice to quit was discontinued. The defendant's husband continued to pay the rent until he died on August 29, 1948. The wife then claimed to be holding over either as sole executrix or as sole beneficiary of her late husband, and rent was accepted from her.

Correspondence then passed between the parties in which the landlords contended that the defendant was holding over as a weekly tenant only because the rent was payable, and paid, weekly, whereas the defendant contended that she was a yearly tenant as from March 22 in each year and was therefore entitled to six months' notice to quit expiring on March 22.

On September 20, 1949, the landlords, with the intention of serving a notice to quit which would be valid to determine her contractual tenancy whether it were weekly or yearly, gave the tenant notice to quit in the following terms: "We . . . your "landlords . . . hereby give you, both in your personal capacity "and as administratrix of Voltaire Cottat, deceased, notice to "quit and deliver up possession of the house and premises with "the appurtenances . . . which you hold of them as tenant "thereof, on Monday, October 3, 1949, or at the expiration of "the current period of your tenancy which shall expire next "after the service upon you of this notice".

The tenant failed to vacate the premises, and the landlords, in October, 1949, brought an action for possession. In that action the tenant filed an affidavit swearing to facts which prima facie showed that she was indeed a yearly tenant as from March 22, and thereby obtained leave to defend. The landlords thereupon decided to discontinue that action also, and because, even according to the tenant's contention, "the current period" of her tenancy which expired next after the service of the notice to quit was March 22, 1950, to wait until after March 22, 1950, when they started the present proceedings founded upon the notice to quit of September 20, 1949.

It was contended on behalf of the tenant that the notice in the form given by the landlords was bad because the tenant would be entitled to regard it as determining a weekly tenancy. For the landlords it was contended that the notice of September 20, 1949, in effect said: "If you are a weekly tenant, go at "the end of the week; alternatively, if you are a yearly tenant, "go at the end of the year", and was accordingly valid.

Michael Hoare for the landlords.
Leonard Caplan for the tenant.

LORD GODDARD, C.J., stated the facts, and continued: In my opinion, the notice to quit dated September 20, 1949, is clearly a notice given to determine a weekly tenancy. Notice to quit, however, as is often said, is given at the risk of him who gives it, and such a notice must not be ambiguous: it must tell the tenant what is required. Here two previous notices to quit had been served, each as for the determination of a weekly tenancy. The notice dated September 20, 1949, is to "quit "and deliver up possession . . . on Monday, October 3, 1949, ". . .", that is more than a week, it is true, but the notice is obviously given as a weekly notice. However, it goes on: "or "at the expiration of the current period of your tenancy which "shall expire next after the service upon you of this notice".

In the ensuing proceedings the landlords swore an affidavit, in which they said that the defendant was a weekly tenant. I think that they were wrong, and that she was not a weekly tenant; I think that she was a yearly tenant because she was holding over on the terms of the lease granted to her husband so far as those terms were applicable to a holding over. She was a tenant under that lease at a yearly rent which could be paid weekly, and which is in fact paid weekly by a sum of money equal to one fifty-second of the yearly rent reserved. I think that the tenant was holding over as a yearly tenant.

In my opinion it is not possible to construe this document of September 20, 1949, as apt to put an end to a yearly tenancy, more especially as the proceedings originally taken on it in October, 1949, were taken on the basis that this was a weekly tenancy.

Now, when that action of October, 1949, has been discontinued, the landlords propose, having first stated in an affidavit that the tenant was a weekly tenant, to say that the notice of September 20, 1949, is a good notice to quit at the end of a year. I do not think that it is; I think that it was intended to terminate a weekly tenancy, and that the words: "or at the "expiration of the current period of your tenancy" refer to the current period of a week, and must be so construed.

The case is governed, so far as I am concerned, by the reasoning in *Mills* v. *Goff* (1), the headnote to which reads as follows: "A notice to quit a house held by the plaintiff as tenant "from year to year, was given to him on June 17, 1840, which "required him to quit the premises 'on October 11 now next "'ensuing, or such other day and time as his said tenancy "'might expire on'. The tenancy had commenced on October 11 "in a former year. *Held*, that this was not a good notice for the "year ending on October 11, 1841".

Pollock, C.B., there said: "The natural meaning of such a "notice, and that which every person reading it would under- "stand it to convey, is this: 'You are to quit my premises on "'October 11 next; but, as I am not certain whether that is the "'proper day or not, I do not confine myself to that particular "'day, but add the words "or such other day or time as your "'"tenancy may expire on"'. If a three months' notice had "been sufficient, this notice would have been good. It is argued

---

(1) (1845) 14 M. & W. 72, 74.

"for the defendant that the notice is meant to embrace the "*double* alternative, of that not being the very day, or that year "not being the very year. I think nothing in the notice "sufficiently appears to point to that conclusion, and that the "tenant, when reading it, could not so construe it, but might "more reasonably infer that his landlord was in error as to the "length of notice necessary, and therefore that the notice was "bad". He then goes on to refer to *Doe d. Lord Huntingtower* v. *Culliford* (2), in which Bayley, J., is reported as saying: "We "are to look to the intention of the landlord When general "language is used, which is open to doubt; the rule is to make "it sensible, not insensible".

I think that the language used here is only consistent with the attitude on the part of the landlords that they had given the tenant a week's notice and that they followed it up by bringing an action against her; and that it was only when they found that she was apparently a yearly tenant that they abandoned the action, though they had sworn that she was a weekly tenant. I think that this was, and always has been, regarded as a notice to terminate a weekly tenancy. I find that this is a yearly tenancy, and so I am obliged to hold that the notice to quit is bad. There must therefore be judgment for the tenant.

Judgment for the defendant.

Solicitors: *Joynson-Hicks & Co.; Percy Haseldine & Co.*

L. F. J. McD.

---

(2) (1824) 4 D. & R. 248, 249.

LONGDON-GRIFFITHS *v.* SMITH AND OTHERS.

1950
June 8, 9, 12, 13, 14, 15, 16, 19, 20, 29, 30; *July* 3, 4, 5.

Slade, J.

Friendly Society—Action for libel against trustees—Against whom must action be brought—Friendly Societies Act, 1896 (59 *&* 60 *Vict.* c. 25), *s.* 94, *sub-s.* 1.

Defamation—Libel—Privilege—Defendants trustees—Malice of one—Effect on defence of others—No liability as trustees of friendly society.

Four trustees of a friendly society had prepared a report on the activities of the plaintiff, general secretary of the society, which was read out by one of them at a general meeting of the society the occasion being one of qualified privilege. Each of the trustees had a right and a duty independently of the others to publish the report. It contained statements defamatory of the plaintiff. One of the four trustees was actuated by malice. The plaintiff brought an action for libel against the trustees both in their personal capacity and as trustees.

Held, (1.) that an action for libel against a friendly society must be brought against it in its registered name and the plaintiff was not entitled to judgment against the defendants as trustees of the society.

Taff Vale Railway Co. v. *Amalgamated Society of Railway Servants* [1901] A. C. 426, applied; *Linaker* v. *Pilcher* (1901) 84 L. T. 421, not followed.

(2.) That as each of the defendants had a right and a duty independently of the others to publish the document containing the libel, the finding of malice against one of them in no way impaired the independent privilege enjoyed by his three co-defendants.

Thomas v. *Bradbury, Agnew & Co. Ld.* [1906] 2 K. B. 627, distinguished. *Smith* v. *Streatfeild* [1913] 3 K. B. 764, questioned and distinguished.

ACTION tried by Slade, J., with a jury.

The plaintiff, Clifford Henry Longdon-Griffiths, was formerly the general secretary of the National Deposit Friendly Society, which was registered under the Friendly Societies Act, 1896. He sued the defendants, Gerard H. Smith, Canon A. P. Pascoe, Val Gould and George F. Cooper, the trustees of the society, both as trustees and in their private capacity, for damages for libel.

The plaintiff complained that all the four defendants, both in their personal capacity and in their capacity as trustees of the society, participated in the preparation of a report on the activities of the plaintiff, who was at all material times the general secretary of the society, with a view to that report being communicated to the general committee of the society at a specially convened meeting, with the object, as expressed in the agenda, of considering the general secretary's terms and conditions of service and tenure of office.

The report, having been so prepared, was published by the defendant Smith, who was president of the society, by reading it to the members of the general committee, some twenty-eight in number, who were present at the meeting on November 6, 1947. It was conceded for the plaintiff that the occasion of the publication of that report, which was the only publication relied on, was one of qualified privilege. The words, although physically spoken by Smith, were spoken by him, not only on his own behalf, but on behalf of his three co-defendants and co-trustees, so that each of the defendants caused them to be so spoken and published. It was also expressly admitted that Smith, in publishing the document, and the other three defendants in concurring in that publication, were acting, not only in their personal capacity, but in their capacity as trustees of the society.

After the document had been read out at the meeting, a resolution was passed, the terms of which were subsequently communicated to the plaintiff, lawfully determining his employment as general secretary by a three months' payment of salary in lieu of notice. The plaintiff accordingly brought this action.

Salmon, *K.C.*, and *Duveen* for the plaintiff.

Scott Cairns, *K.C.*, and *Ashworth* for the defendants.

Slade, J. [after stating the facts:] In those circumstances it was pleaded in para. 8 of the amended statement of claim that "by reason of the premises the plaintiff has been brought into "hatred, ridicule and contempt and his said service agreement "was terminated on November 6, 1947, and the plaintiff has "suffered damage". I emphasize that November 6, 1947, was the date on which publication was alleged in paras. 4 and 5 of the amended statement of claim. "By reason of the premises" must, of course, mean "By reason of the publications herein-"before complained of".

The case was tried with a jury. At one stage of the case Mr. Salmon intimated that he did not allege malice against the defendants Pascoe or Gould, and said that he did not desire to ask the jury to find that either of those defendants was malicious. However, as they had been charged with malice, I thought it better to let the question go to the jury in respect of each defendant, reserving my right to rule on a submission, which Mr. Scott Cairns had made at the close of the plaintiff's case, that there was no evidence of malice to go to the jury in respect of any of the four defendants. The jury by their verdict found that the defendants Smith, Pascoe and Gould were not malicious, and that the defendant Cooper was. In reply to questions left to them they assessed the plaintiff's general damages at 250*l*., and the special damages, if he were entitled to recover under that head, at 625*l*.

It was contended throughout for the defendants that no action for libel would lie against a friendly society in the name of its trustees, and that any action for libel against such a society, either with or without some of its officers, must be brought against the society in its registered name. They therefore contended that, although it was expressly admitted on the pleading that they were acting throughout as the trustees of the society, nevertheless the society itself was not sued in the action; that, as a matter of jurisdiction, I had no power to give judgment against the society, even if malice had been found against each of the individual defendants, because the action merely sued four persons in two different capacities; and that, although, if malice were found, they would be liable in their personal capacity, no judgment could be given against the society in the action as now constituted.

Before I can enter judgment there are several questions to be decided. The first one is that which I have already mentioned—namely, is the plaintiff entitled to judgment against the defendants in their capacity as trustees of the society? The second question involves an important point in the law of libel and a consideration of the well-known decision of Bankes, J., in *Smith* v. *Streatfeild* (1).

It is said that malice having been found by the jury against the defendant Cooper, the effect of that finding is to deprive the three co-defendants whom the jury found not to have been malicious, of the protection of the occasion of qualified privilege and therefore to make them jointly liable with Cooper for the damages which the jury awarded. The third point which has been argued is on the special damage which the jury found that the plaintiff had sustained in addition to the general damages which the law presumes from the mere publication of a libel.

To take the first point, the general rule, as I understand it, is that an unincorporated society cannot be sued, though in some cases leave may be given to bring a representative action. That, however, does not apply to an action in tort, and consequently statutory authority must be found for any action of that character which it is sought to bring against a society like a friendly society which is not incorporated.

In the present case Mr. Salmon relied particularly on s. 94, sub-ss. 1 and 2, of the Friendly Societies Act, 1896. Until quite a late stage in the argument on this point, he based his contentions on cases decided under s. 9 of the Trade Union Act, 1871, and suggested that the language of s. 9 of the Act of 1871 was substantially the same as the language of s. 94 of the Friendly Societies Act, 1896. It was not until after he had closed his argument on that point, and after Mr. Scott Cairns had replied to it, that Mr. Salmon emphasized an important difference, to which I shall have hereafter to refer, between the language of s. 94 of the Friendly Societies Act, 1896, and s. 9 of the Trade Union Act, 1871.

I will paraphrase s. 94, sub-s. 1, of the Friendly Societies Act, 1896, and s. 9 of the Trade Union Act, 1871, leaving out the unimportant words so as to make it easier to compare the two sections. Section 94, sub-s. 1, of the Friendly Societies Act, 1896, omitting immaterial words, is as follows: "Trustees may "bring or defend any action or other legal proceeding touching

---

(1) [1913] 3 K. B. 764.

"or concerning any property, right, or claim of the society or "branch". The material words of s. 9 of the Act of 1871, are these: "The trustees of any trade union . . . are hereby "empowered to bring or defend any action . . . touching or "concerning the property, right, or claim to property of the "trade union". Apart from substituting the definite word "the" for the word "any", the sections are substantially identical, except for the addition in the Act of 1871 of the words "to property" after the words "right, or claim".

I propose, therefore, to consider the argument on this point by referring to the authorities cited on the Trade Union Act and then consider whether the omission from s. 94, sub-s. 1, of the two words "to property" in s. 9 of the Act of 1871 makes any difference to the conclusion which I should have reached had I been concerned with the precise phraseology of s. 9 of the Act of 1871. Mr. Salmon contended that the construction of the Act of 1871 was concluded in favour of the interpretation which he put forward by the judgment of Mathew, J., in *Linaker* v. *Pilcher* (2). Mr. Scott Cairns contended that the interpretation was concluded in precisely the opposite way by the decision of the House of Lords in *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* (3). It is, therefore, clear that those two cases must be closely scrutinized.

[His Lordship reviewed the two decisions in detail, reaching the conclusion that *Linaker* v. *Pilcher* (4) had been impliedly overruled by the *Taff Vale* case (3), and continued:] Mr. Salmon took the point which has caused me the greatest difficulty of all the points of law which have arisen in this case. The words in s. 94 of the Friendly Societies Act, 1896, are "touching or concerning any property, right, or claim of the society", not "touching or concerning the property, right or claim to property of the society", which are the corresponding words in the Act of 1871, substituting "trade union" for "society". Mr. Salmon has not unnaturally argued that the omission of those two words from the later Act of 1896 shows a different intention from that which is to be deduced from the language of s. 9 of the Act of 1871.

He also points to s. 94, sub-s. 2, which says: "In legal proceedings brought under this Act by a member, or person "claiming through a member, a registered society or branch may "also be sued in the name, as defendant, of any officer or "person . . .", and he says "also" means in addition to the remedy under sub-s. 1 of suing the trustees. Counsel argued that legal proceedings brought by a member, or a person claiming through a member, against persons who receive contributions and issue policies are not proceedings "touching or "concerning the property"; and consequently he says that sub-s. 2 fortifies the omission of the two words "to property" which appear in the Act of 1871 from the words in the Act of 1896 "right or claim of the society". Mr. Salmon said that the words must be read: "The trustees may bring or defend any "action or other legal proceeding" (1.) if it touches or concerns the property of the society, which he says is the only reference to property; or (2.) if it concerns any right of the society; or (3.) if it concerns any claim of the society.

---

(2) (1901) 84 L. T. 421.
(3) [1901] A. C. 426.
(4) 84 L. T. 421.

It would be an astonishing form of language if what was really meant by s. 94, sub-s. 1, was that in any action or legal proceeding a registered friendly society could sue or be sued in the name of the trustees. If one gives to the meaning of the words in s. 94, sub-s. 1, the construction which counsel for the plaintiff seeks to ascribe to them, you first of all get the words "touching or concerning any property", which are completely otiose if the trustees can be sued in any action or legal proceeding as trustees.

One then gets, following the words "the trustees may bring "or defend", the words "right or claim of the society", which apparently only refer to "right of the society" or "claim of "the society", not "liability of the society" or "claim against "the society". Taking the words "bring or defend", Mr. Salmon, recognizing that difficulty of language, says: "The "trustees may bring or defend any action touching a right of the "society". How they could bring an action is quite obvious, but why should they defend an action concerning a right of the society? Mr. Salmon says: "That is the right of the society to "publish a defamatory document".

Then when one comes to s. 94, sub-s. 2, on which Mr. Salmon relies, that provides: "In legal proceedings brought under this "Act . . . a registered society or branch may also be sued". What are "legal proceedings brought under the Act of 1896"? At first sight it would look as though s. 94, sub-s. 2, were limited to "legal proceedings brought under this Act", which I should at first sight take to be "which could not have been "brought because they would not have lain except for the provisions of this enactment".

I have to make up my mind on this difficult point, which, put in a nutshell, is this: Are the words of s. 94 of the Act of 1896 to receive a wholly different, because a much wider, construction from that which I have held has been put on the words of s. 9 of the Act of 1871, by reason only of the omission from the former section of the words "to property" after the words "right or claim"? Bearing in mind, on the

1950

LONGDON-GRIFFITHS v. SMITH.

Slade, J.

one hand, the omission of the words from s. 94 of the Act of 1896, emphasizing the words in s. 94, sub-s. 1, " touching or " concerning any property, right, or claim of the society ", which I construe to mean " touching or concerning any property " of the society, touching or concerning any right of the society, " touching or concerning any claim of the society ", giving full weight to Mr. Salmon's argument in respect of s. 94, sub-s. 2, relating to " legal proceedings brought under this Act ", whatever that may mean, and bearing in mind the obvious difficulties and inconvenience which might be caused if this kind of action can be brought, as it was in the present case, against defendants who, both as individuals and as trustees of the society, were alleged to have published the libel complained of, I give the same construction to the words of s. 94, sub-s. 1, of the Act of 1896 as I have held that Farwell, J., and the House of Lords gave to the corresponding words of s. 9 of the Act of 1871 in *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* (5).

I arrive at that conclusion, furthermore, by comparing the position of trustees, as set out in s. 8 of the Act of 1871, with their position under ss. 25, 34, 47, 49, 50 and 51 of the Act of 1896, the sum total of these six sections being substantially identical with the provisions of s. 8 of the Trade Union Act, 1871. Those provisions seem to me to point to trustees suing and being sued in respect of matters touching or concerning the property of the society because the statute itself vests the whole of the society's property in them. That disposes of the first point.

I now come to what I refer to compendiously as the *Smith* v. *Streatfeild* (6) point. The jury in the present case found that the defendant Cooper in publishing the report complained of was actuated by malice, with the result that he automatically lost the protection afforded to an occasion of qualified privilege. Mr. Salmon contended that the plaintiff is entitled to judgment against the three co-trustees in their personal capacities on the ground that they were joint tortfeasors, and that Bankes, J., in *Smith* v. *Streatfeild* (6) decided that, where one of two or more joint tortfeasors was found to be malicious, that finding of malice destroyed the privilege, not only of the tortfeasor who was found to be malicious, but of the others who were joint tortfeasors in respect of the publication of which complaint was made.

The plea of privilege in this case is set up in para. 7 of the amended defence. Mr. Salmon conceded that the occasion of the publication of the report by its being read out by the defendant Smith at the meeting of the general committee of the society on November 6, 1947, was a privileged occasion and I

(5) [1901] A. C. 426.

(6) [1913] 3 K. B. 764.

intimated then that not only should I rule that the occasion was one of qualified privilege but also that it was one of qualified privilege as regards each of the four defendants.

Smith v. *Streatfeild* (6) still remains the law although thirty-seven years almost to a day have passed since it was decided. It has not, however, come through battle unscathed, the Court of Appeal in *Crozier* v. *Wishart Books Ld.* (7) stating that it would require careful consideration when it came before them. It was followed in *Smith* v. *National Meter Company Ld.* (8), where Uthwatt, J., said that, whatever view he might entertain of the correctness of the decision in *Smith* v. *Streatfeild* (6), which he described as " a tottering authority ", he was bound as a judge of first instance to follow it. I do not think that Uthwatt, J., was bound to follow it (see *Green* v. *Berliner* (9) and *Forster* v. *Baker* (10)), and Mr. Scott Cairns has invited me to give the last push to this tottering authority. Had it been necessary for me to do so, I should have had to consider whether it was not my duty to refuse to follow that decision because, with the utmost respect for a most distinguished judge and mindful of the length of time which the decision has lasted, I feel that the decision was based on a false premise, namely, that a person who publishes a defamatory statement on an occasion of qualified privilege is a tortfeasor. In my judgment, a person who publishes a defamatory statement on an occasion which the law has clothed with the protection of qualified privilege is not a tortfeasor, and a person cannot be a joint tortfeasor unless he is a tortfeasor. I have particularly in mind the passage in the considered judgment of Bankes, J., in *Smith* v. *Streatfeild* (11), which is in these words: " . . . the publication here complained of was a joint " publication—that is to say, a single publication to each rural " dean for which both defendants were jointly responsible. This " publication was admitted by the printers. The finding of the " jury establishes the fact that the defendant Canon Streatfeild " was a tortfeasor as regards this publication. It necessarily " follows, in my opinion, that the printers are joint tortfeasors " with him ".

Later, after referring to a rule of law, Bankes, J., said: " In " my opinion it follows from this rule of law that in the case of a " joint publication of a libel each tortfeasor is liable for the malice " of the other ". The question is whether he is a tortfeasor or not. If he is a tortfeasor, there is no need to worry about malice.

The first question is: what did *Smith* v. *Streatfeild* (11) decide? It is not uninteresting to inquire what the result would have been if, instead of Canon Streatfeild having been found

(7) [1936] 1 K. B. 471.
(8) [1945] K. B. 543.
(9) [1936] 2 K. B. 477.
(10) [1910] 2 K. B. 636.
(11) [1913] 3 K. B. 764.

guilty of malice and the printers not guilty of malice, the jury had found that the printers had been guilty of malice and not Canon Streatfeild. Would it have been then argued that Canon Streatfeild had been deprived of the protection of his qualified privilege because, unknown to him, he had selected out of the many hundreds of printers in this country the only one who happened to have a grudge against the plaintiff? Consider the position of solicitors. In the course of litigation dozens of letters containing remarks which are defamatory are written every day by solicitors on the instructions of their clients to the solicitors on the other side or to the other party in the litigation or the impending litigation. In such cases there is a publication by the sending solicitor to his typist or to the solicitors on the other side. Does a solicitor who writes such a letter on the instructions of his client lose all protection of the privilege of the occasion if his client turns out to be malicious? Indeed, in those cases where the instructions which are given to the solicitors are diametrically opposed, it is almost certain that one of the clients would be held to be malicious. I need hardly point out how many letters written by solicitors in the furtherance of their clients' interests are necessarily couched in terms which are defamatory of the other party to a dispute. It shows, at any rate, the importance of seeing what *Smith* v. *Streatfeild* (11) really decided.

In that case the plaintiff was one of the diocesan surveyors for the diocese of Oxford, and his re-election to that office rested with the rural deans. The defendant, Canon Streatfeild, was desirous of bringing to the notice of the rural deans matters affecting the plaintiff in relation to a survey which the plaintiff had made of a rectory house and glebe in which the defendant, Canon Streatfeild, was directly interested as rector. It was conceded that the document containing those matters which was distributed by Canon Streatfeild amongst the rural deans was published to each of those rural deans on an occasion of qualified privilege. It was also conceded, or was found, that, having regard to the number of persons to whom the document had to be transmitted, it was reasonable in the circumstances to have that document printed; and the other defendants, the Robert Spennel Press, were employed by Canon Streatfeild to print the pamphlet which he proposed to disseminate amongst the rural deans. The pamphlet contained statements which were defamatory of the plaintiff, and the jury found as a fact that the defendant Canon Streatfeild in making the publications complained of was actuated by malice, but that the defendant printers were not so actuated. It was argued there that the malice of Canon Streatfeild deprived the printers, who were innocent of malice, of their protection under the plea of privilege.

The first and most important point to notice in the case is that the privilege of the printers was, what I will call, a derivative one. They had no privilege other than such as they derived from the privilege of Canon Streatfeild. Privilege entails a reciprocity of interest or duty between the publisher of a defamatory document and every person to whom the defamatory document is published. A glance at the arguments of Sir Frederick Low and of Mr. McCardie, shows that the difference between a derivative privilege and an independent privilege was present to the minds of counsel on both sides. Indeed, Mr. McCardie went so far as to argue that the mere printing and publication of the pamphlet by the printers in the ordinary course of business was sufficient to constitute an independent privilege in them, an obviously untenable argument which the judge refused to accept.

In the present case I ruled that each one of these four defendants, not only had a duty to publish the report complained of to the members of the general committee of the society, who had a duty to receive it, but that the report contained matters involving a common or corresponding interest between each of the trustees and the members of the general committee to whom the report was published. In other words, if Cooper had been malicious, and indeed, if the other three defendants had known that Cooper was malicious, it would still have been their duty to publish the document which they did publish. Malice has nothing to do with the creation of privilege, but only with its destruction. Rightly or wrongly, I have ruled that each of these four had a separate duty independently of the others to make the publication which in fact they made or caused to be made.

Smith v. *Streatfeild* (11) as I understand it, decided this and this only: that where two persons are jointly responsible for the publication of a defamatory document and one of them is clothed by the law with the protection of qualified privilege, and the other shares that privilege merely because his publication is ancillary to and reasonably necessary for the discharge of the duty which creates the privilege, then if the occasion of privilege is destroyed by the malice of the person for whose benefit it was created, the person who is responsible for the publication in the ancillary sense is necessarily deprived of his privilege because there is nothing left to protect him. The privilege has gone; he has no privilege of his own apart from that of his co-defendant and therefore, however innocent he may be, he loses the protection with which the law clothes the occasion of publication by his co-defendant.

The present is, I hold, an entirely different case, in which, as I have said, each defendant had a right and a duty, quite independently of the others, to publish the document which he did publish on the occasion and to the persons to whom he published it. I ask myself what would be the position of such a person if, just as he was about to discharge his duty or to protect his interest, he was told that someone else who had a like duty and interest to discharge or protect was likely to be held by a jury at some future time to be malicious? Does the first person's duty or his right to protect his own interest become any the less, because someone who has a corresponding duty to discharge or a corresponding interest to protect may be prevented from discharging his duty or protecting his interest for fear that he may be found to have been malicious? I hold that the destruction of the privilege with which the law clothed Cooper in causing the publication in this case by Smith, as the result of the jury's finding of malice against him, in no way impaired the independent privilege which was enjoyed by Cooper's three co-defendants.

I should not do justice to Mr. Salmon's very able argument if I failed to refer to *Thomas* v. *Bradbury, Agnew & Co. Ld.* (12). Indeed, Mr. Salmon said that that case must be taken to have decided the precise point which seven years later was thought to be decided by *Smith* v. *Streatfeild* (13), and that whereas I might not be bound by *Smith* v. *Streatfeild* (13) I should certainly be bound by the Court of Appeal in the earlier case.

Further, he fortified that submission by referring to a passage from the judgment in *Pratt* v. *British Medical Association* (14), of McCardie, J., who, as "Mr. McCardie", had argued the case for the defendants in *Smith* v. *Streatfeild* (13). McCardie, J., said: "I may incidentally add that, had it been necessary to "decide the point, I should hold that where persons are acting "in combination to achieve such a purpose as that which is "shown in the present case, then the proved malice of one or "more may be attributed to the other participants in the com-"bination. See the rule established in cases of defamation by "*Thomas* v. *Bradbury, Agnew & Co. Ld.* (15), and *Smith* v. "*Streatfeild* (16)".

If the rule had already been established by the Court of Appeal in *Thomas* v. *Bradbury, Agnew & Co. Ld.* (15), in 1906, it is rather remarkable that no one pointed out to Bankes, J., seven years later, in 1913, that he need not trouble to decide the point at all because it had already been decided by the Court of Appeal seven years earlier.

The facts in *Thomas* v. *Bradbury, Agnew & Co. Ld.* (15) were that a review by Sir Henry Lucy, a contributor to Punch, of a book written by the plaintiff, was published in Punch, the

(12) [1906] 2 K. B. 627.
(13) [1913] 3 K. B. 764.
(14) [1919] 1 K. B. 244, 279.
(15) [1906] 2 K. B. 627.
(16) [1913] 3 K. B. 764.

proprietors of which were the defendants Bradbury, Agnew & Co. Ld. Among other defences to an action for libel brought by the plaintiff in respect of that publication, the defendants pleaded fair comment. A defence of fair comment is destroyed by express malice in the same way, of course, as is a defence of privilege. But in *Thomas* v. *Bradbury, Agnew & Co. Ld.* (15) the point, which was subsequently decided by Bankes, J., in *Smith* v. *Streatfeild* (16) seven years later, was not discussed in any way.

I have not seen the pleadings in *Thomas* v. *Bradbury, Agnew & Co. Ld.* (15) and the issues do not appear too clearly from the report.

The argument for the defendants in the Court of Appeal was that there was no case against Sir Henry Lucy, not that if Sir Henry Lucy was rightly held liable, they ought not to be. That that must be so appears to me to be perfectly clear, and Mr. McCardie would, of course, have brought the decision of the Court of Appeal in *Thomas* v. *Bradbury, Agnew & Co. Ld.* (17) to the notice of Bankes, J., in *Smith* v. *Streatfeild* (16) if he had thought that it was an authority binding on Bankes, J., and was diametrically opposed to the contention that he was putting forward. I am satisfied that there is nothing in the Court of Appeal's decision in *Thomas* v. *Bradbury, Agnew & Co. Ld.* (17) which gives the support of the Court of Appeal to the decision of Bankes, J., seven years later in *Smith* v. *Streatfeild* (16). As I have already indicated, even if I thought there had been, I find that the facts of the present case and the nature of the privilege arising from them, distinguish it entirely from the principle which I think underlay the decision in *Smith* v. *Streatfeild* (16). That covers the second point.

I now come to the issue of special damage, on which the law has been argued. Counsel for the defendants takes three points on that. Firstly, he says that special damage was not pleaded. Secondly, that there was no evidence of special damage to go to the jury in any event; and, thirdly, that if he is wrong on both those submissions, the damage was too remote to be recoverable in law.

Having considered those matters his Lordship found, first, that there was a claim for special damage; secondly, that there was evidence of special damage to go to the jury; and, thirdly, that special damage which the jury found as a fact was sustained by the plaintiff in this case was not too remote to be recoverable in law, and concluded: In the result I give judgment for the plaintiff for 875*l.* against the defendant Cooper, with seven-eighths of his costs of the action, and for the three remaining defendants against the plaintiff with three-quarters of the defendants' total costs of the action.

---

(17) [1906] 2 K. B. 627.

Solicitors: *Isadore Goldman & Son; Woolley, Tyler and Bury.*

L. F. J. McD.

O'MEARA *v.* SOUTH-EASTERN GAS BOARD.

C. A.
1950
June 30.
Somervell and Denning, L.JJ.

Gas nationalization—Plaintiff's agreement with gas company for annuity—Disclaimer by Area Gas Board—Reference to Gas Arbitration Tribunal—Notice of disclaimer revoked—Action by plaintiff against board under agreement for annuity—Jurisdiction of High Court—Gas Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 67), *ss.* 22 *and* 36.

The plaintiff alleged that by an agreement in writing dated December 28, 1945, made between the Croydon Gas Company and himself, he was entitled to an annuity from the company until his death. By s. 17 of the Gas Act, 1948, the liabilities and obligations of the company became vested in the South-Eastern Gas Board on May 1, 1949. The board disclaimed the agreement by notice in writing given under s. 22 of the Act, and the matter was referred to the Gas Arbitration Tribunal, which revoked the notice of disclaimer, holding that the agreement was made in the ordinary course of business. The plaintiff now sued the board, claiming a declaration that he was entitled under the agreement to payment of the annuity by the board until his death, and claiming payment of the instalment of the annuity due on May 1, 1950. The board contended that the High Court had no jurisdiction to entertain the claim by reason of sub-s. 5 of s. 36 of the Gas Act, 1948, which provides that, where a reference is made to the arbitration tribunal with respect to any notice given under Part II of the Act (which includes s. 22) disclaiming an agreement, the tribunal shall have exclusive jurisdiction to determine claims arising under the agreement.

Held, that s. 36 of the Gas Act, 1936, had no application to any agreement entered into before January 23, 1948, and, therefore, the jurisdiction of the court to entertain this claim was not ousted by sub-s. 5 of that section.

Quære, whether even in the case of an agreement made on or after January 23, 1948, which remained in force by reason of the Gas Arbitration Tribunal having revoked a notice of disclaimer, the jurisdiction of the court was ousted by sub-s. 5 in respect of disputes arising under the agreement.

Decision of Parker, J., reversed.

C. A.

1950

O'MEARA
v.
SOUTH-EASTERN GAS BOARD.

APPEAL from Parker, J., in chambers.

The plaintiff alleged that by an agreement in writing dated December 28, 1945, made between himself and the Croydon Gas Company, his employers, he had been entitled to an annuity from the company until his death. By Pt. II of the Gas Act, 1948, the properties, rights, liabilities and obligations of undertakers like the company, which existed immediately before May 1, 1949, became vested in the South-Eastern Gas Board on that date. The board, acting under s. 22 of the Gas Act, 1948 (1), by due notice in writing disclaimed the agreement of December 28, 1945. The matter was referred to arbitration under the proviso to s. 22, sub-s. 1, of the Act, and the Gas Arbitration Tribunal (see s. 63) revoked the notice, holding that the agreement was made in the ordinary course of business and was in no way connected with any provision made by the Gas Act, 1948, or with any anticipation of the making of any such provision.

The plaintiff now sued the South-Eastern Gas Board, claiming a declaration that he was entitled under the agreement in question to an annuity from the board until his death, and claiming payment of the instalment of that annuity due on May 1, 1950. The board objected that there was no jurisdiction in the High Court to entertain the claim by reason of sub-s. 5 of s. 36 of the Act

(1) Gas Act, 1948, s. 22, sub-s. 1: "Where there are vested in any Area "Board . . . the rights, liabilities and "obligations of any undertaker to "whom this Part of this Act applies, "being rights, liabilities and obligations under an agreement made or "varied on or after the 19th November, 1945, and the Board . . . are "of opinion that the making or the "variation of that agreement was "not reasonably necessary for the "purposes of the activities of the said "undertaker or that the agreement "was made or varied with an unreasonable lack of prudence on the "part of the said undertaker, the "Board . . . may, by notice in writing "given to the other parties to the "agreement before the expiration of "three months from the vesting date, "disclaim the agreement: Provided "that any of the said parties "may, within the prescribed period "from the date on which the notice "is served, refer to arbitration under "this Act the question whether or "not the agreement ought to be 'disclaimed".

Sub-s. 2: "On such arbitration, "the arbitration tribunal, if satisfied that the agreement or variation "was not reasonably necessary as "aforesaid or was made with unreasonable lack of prudence, shall "confirm the notice and if not so "satisfied shall revoke it: Provided "that, if the arbitration tribunal are "satisfied that the agreement or "variation thereof was made in the "ordinary course of business and was "in no way connected with any provision made by this Act, or with "any anticipation of the making of "any such provision, the tribunal "shall revoke the notice".

Sub-s. 3: "Where a notice is so "given by an Area Board . . . "with respect to any agreement "and is not revoked by the arbitration tribunal— . . . (*b*) the agreement shall be deemed to have been "frustrated on the vesting date and "the parties thereto for that reason "to have been discharged from the "further performance thereof . . .".

of 1948 (2). The master, on an application by the board that the writ of summons in the action and all subsequent proceedings be set aside, decided to the contrary; but, on appeal, the judge in chambers, Parker, J., reversed that decision, holding that the court had no jurisdiction to entertain the claim.

The plaintiff appealed.

Gardiner, K.C., and *Maurice Lyell* for the plaintiff. Sub-s. 5 of s. 36 does not here oust the jurisdiction of the court. The plaintiff is claiming before the courts his ordinary rights at common law under a contract, and their jurisdiction will not be ousted except by clear words. But it is plain here that s. 36 has no application to the contract of the plaintiff which was made on December 28, 1945. The ambit of s. 36 is clearly defined in sub-s. 1: "This section shall apply in any case where on or "after January 23, 1948, any company, being an undertaker "to whom this Part of the Act applies . . . (*d*) entered into "or varied any agreement so as to require an excessive con-"sideration to be paid or given by the company". It was the suggestion contained in those last words on which the board based their claim for disclaimer, which was negatived by the arbitration tribunal. Full meaning can be given to the words of sub-s. 5 as covering the case where an agreement is made by a company on or after January 23, 1948, and the board seeks to disclaim it and a party refers the matter to the arbitration tribunal: the reference to the tribunal might be double—covering the question of disclaimer and the net loss or liability caused to the company by the terms of the agreement.

Further, in any case, the words in sub-s. 5 (*a*): "to deter-"mine claims arising in respect of the transaction or under the "... agreement", do not cover a claim as to what the plaintiff is entitled to under the agreement when the agreement has been held to be not disclaimable. The cross-heading to s. 36, which is: "Re-opening of transactions resulting in dissipation of "assets", is relevant on this issue: see the judgment of Cohen, J., in *In re Carlton* (3) as to the extent to which crossheadings can be considered; see also the judgment of Hilbery, J., in *Mountain* v. *Bermondsey Borough Council* (4).

---

(2) Section 36, sub-s. 1: "This "section shall apply in any case "where on or after January 23, 1948, "any company, being an undertaker "to whom this Part of this Act "applies, and not being an ancillary "gas undertaker . . . (*d*) entered "into or varied any agreement so as "to require an excessive considera-"tion to be paid or given by the "company . . .".

Sub-section 5: "Where any "application is made to the arbitra-"tion tribunal under this section in "respect of any transaction, or a "reference is made to that tribunal "with respect to any notice given "under this Part of this Act dis-"claiming an agreement . . . the "tribunal shall have exclusive juris-"diction—(*a*) to determine claims "arising in respect of the transaction "or under the . . . agreement . . ."

(3) [1945] Ch. 280, 284.

Upjohn, K.C., and *Megaw* for the defendant board. The words of sub-s. 5 are clear and general. It begins: "Where "any application is made to the arbitration tribunal under this "section in respect of any transaction". The words are an "application . . . under this section". Then the sub-section provides that, where a reference is made to the arbitration tribunal with respect to any notice given under Pt. II of the Act, disclaiming an agreement, the tribunal have exclusive jurisdiction to determine claims arising under the agreement. These words are quite general. The terms of sub-s. 4 of s. 36 are express, being limited to an agreement entered into or varied on or after January 23, 1948. There are no such limiting words in this sentence in sub-s. 5.

[Denning, L.J. If a contract continuing after the vesting date, such as the plaintiff's, is not disclaimed, it is not suggested that the courts have not jurisdiction over it, yet, it is said, because the board have attempted to disclaim this contract and have failed to do so, the courts have no jurisdiction over it.]

The words of sub-s. 5 are clear as covering a reference in respect of a claim to disclaim an agreement made after November 19, 1945, as was that in question (see s. 22, sub-s. 1, of the Act). That being so, the words of sub-s. 5 (*a*): "to determine "claims arising in respect of the transaction or under the . . . "agreement", cover all claims under the agreement, including a claim as to what a party is entitled to under it.

Somervell, L.J. This appeal concerns the construction of ss. 22 and 36 of the Gas Act, 1948. That Act refers to certain dates: November 19, 1945; January 23, 1948; and May 1, 1949. On the first date, as counsel explained to us, the Lord President announced the intention of the Government to nationalize the gas industry; the second was the date of the publication of the text of the Gas Bill; and the third was the date on which the assets of gas undertakings became vested in the area boards. By the terms of the Act, according as certain agreements and transactions are entered into before or after November 19, 1945; between November 19, 1945, and January 23, 1948; or on or after January 23, 1948, and before May 1, 1949, there flow or may flow certain results. The main purpose of the Gas Act, 1948, which was to effect what is ordinarily called nationalization of the gas industry, is familiar, and only the broad outlines are necessary for understanding the sections which we have to construe. Part I sets up area gas boards and a Gas Council. Part

---

(4) [1942] 1 K. B. 204, 207.

II concerns the acquisition of the existing gas undertakings; and it is on the construction of sections in that Part of the Act that this case turns. Section 63 sets up a Gas Arbitration Tribunal which is to deal with questions which under the Act are to be determined by arbitration.

Sections 22 and 36 are in a group of sections headed: "Part II. Acquisition of gas undertakings. Vesting of assets". The Part contains provisions by which agreements made by the undertakers are transferred to and become vested in the board. Section 22 gives the board power to disclaim agreements made on or after November 19, 1945.

[His Lordship read the section.]

Broadly speaking, so far as that section is concerned, the only issue that would arise is whether this was a contract made in the ordinary course of business and in no way connected with any provision made by this Act, or whether it was not reasonably necessary for the purposes of the activities of the undertaker or was made or varied with an unreasonable lack of prudence on the part of the undertaker. I think that the section contemplates that every agreement should fall into one or other of those categories. Pausing there, it is possible that in settling that dispute a question of construction might arise. The board might say: "Look at para. 10 of the agreement. The consequences "of that are clearly oppressive to the undertaker, and it was "entered into with a view to nationalization". The other side might say: "That is not what it means at all. Properly con-"strued, its effect is not onerous and shows that it was entered "into in the ordinary course of business". I mention that only because it was referred to in the course of the argument. It seems to me that if the board did come to their conclusion, on a certain construction of the agreement, and later proceedings should be taken in court—as Mr. Gardiner contends, and as I am going to hold is possible—a question might arise whether the decision of the arbitration tribunal on the construction of the contract quoad the issue then raised constituted res judicata between the parties. That is not a point that we have to decide today, and I mention it only because it seems to me that a point of construction of this kind might arise under s. 22. As has been stated, s. 22 gives a right to disclaim in respect of contracts made on or after November 19, 1945, down to the vesting date.

It is on s. 36 that this case turns. By its opening words it clearly refers to, inter alia, a class of contract which might be included in the class covered by s. 22. It provides by sub-s. 1: "This section shall apply in any case where on or after January 23, "1948, any company, being an undertaker to whom this Part "of this Act applies . . . (*a*) made any payment . . . for an "inadequate consideration; (*b*) sold or disposed of any of its

C. A.

1950

O'MEARA
v.
SOUTH-EASTERN
GAS BOARD.

Somervell, L.J.

"property . . . for an inadequate consideration; (c) acquired "any property . . . for an excessive consideration; (d) entered "into or varied any agreement so as to require an excessive consideration to be paid or given by the company; or (e) entered "into any other transaction of such an onerous nature as to "cause a loss . . . and the payment . . . was not reasonably "necessary for the purposes of the company or was made with "an unreasonable lack of prudence on the part of the company". There follows a proviso with which we are not concerned. That section applies to agreements entered into on or after January 23, 1948. Prima facie this agreement, which was entered into on December 28, 1945, is outside s. 36.

By sub-s. 2: "The appropriate board may, at any time before "the expiration of a period of twelve months beginning with the "vesting date, make an application to the arbitration tribunal "in respect of any transaction to which in the opinion of the "board this section applies", and all interested parties are to "be made parties to that application". It is not disputed that that applies to any transactions of the kind specified made on or after January 23, 1948.

Sub-s. 3 provides: "Where the arbitration tribunal are "satisfied that the transaction in respect of which an application "is made is a transaction to which this section applies, then, "unless they are also satisfied that the transaction was in the "ordinary course of business and was in no way connected with "any provision made by this Act or with any anticipation of "the making of any such provision, the tribunal shall determine "the extent of the net loss or liability caused to or imposed on "the company by the transaction, and shall make such orders "against all or any of the parties to the application (other than "the appropriate board) as the tribunal think just, having regard "to the extent to which the parties were respectively responsible "for the transaction or benefited from it, for the payment by "them to the appropriate board of sums sufficient to enable the "net loss or liability, or such part thereof as the tribunal think "just, to be made good or met".

The position, therefore, is that, in regard to what I will call the contracts held to be unduly onerous made from November 19, 1945, up to the vesting date, there is power to disclaim. In respect of such contracts and transactions made on or after January 23, 1948, in addition to the board's power to disclaim, the parties can be ordered to make repayments to the board in accordance with the provisions which I have read.

So far, of course, that provision might be invoked in a case where there was no question of disclaimer because the contract might have been completely performed and the loss incurred, but the procedure had also to be adapted to cases where there was an agreement made or varied on or after January 23, 1948, which still continued in force and which the board wished to disclaim.

By sub-s. 4 of s. 36: " Where the appropriate board have " disclaimed an agreement . . . by a notice under this Part " of the Act, being an agreement . . . entered into or varied " on or after January 23, 1948, the board may make an application to the arbitration tribunal under this section in respect " of any loss or liability caused to or imposed on the company " before the vesting date . . . ". So far it is clear that we are concerned with applications by the board. As I see it, sub-s. 4 contemplates the case where the disclaimer, which would be under s. 22, has not been challenged. Of course there might be such cases, and it is saying that in that case the board can make an application for repayments.

This dispute turns on the terms of sub-s. 5 which provides: " Where any application is made to the arbitration tribunal " under this section in respect of any transaction "—it is admitted that that means in respect of transactions entered into or varied on or after January 23, 1948—" or a reference is made " to that tribunal with respect to any notice given under this " Part of this Act disclaiming an agreement . . . , the tribunal " shall have exclusive jurisdiction—(*a*) to determine claims " arising in respect of the transaction or under the . . . " agreement ".

Mr. Upjohn contends, and the judge has so held, that those words cover, first of all, a reference in respect of a claim to disclaim an agreement made between November 19, 1945, and January 23, 1948. Mr. Gardiner contends that they must be restricted to what has so far been dealt with in s. 36 and the subject-matter to which by its opening words he says that it is restricted, namely, post January 22, 1948, transactions. That is the first matter in dispute.

Then Mr. Upjohn goes on to submit that if he is right and these words cover disputes as to the disclaimer of agreements made or varied in the period between those two dates, then the words of sub-s. 5 (*a*): " to determine claims arising in respect " of the transaction or under the . . . agreement ", cover all claims in respect of that transaction, including disputes as to what a party to the agreement is entitled to, on the supposition, as happened here, that the agreement has been held not to be disclaimable.

Mr. Upjohn says with force that whereas, for instance, in sub-s. 4, notwithstanding the opening words of s. 36, sub-s. 1, it was thought necessary to repeat the limit of date and make it clear that sub-s. 4 applied only to post-January 22, 1948, matters, when one comes to sub-s. 5 there is no such limitation;

that it would have been natural to insert the date or to put in the words "to which this section applies" or, in other words, expressly to limit the generality of the words used.

That argument has force, but I have come to the conclusion that the words must be limited for, perhaps, more than one reason. There is, I think, force in Mr. Gardiner's submission that where, as here, a dispute as to the ordinary rights at law under a contract are in question, clear words would be needed to oust the jurisdiction of the court. As was pointed out by my brother Denning in the course of the argument, it is common ground that, if a running contract—that is to say, a contract the period of which is to extend after the vesting date—is not disclaimed and no attempt is made to disclaim it, no one suggests that any tribunal other than the ordinary courts would decide the rights of the parties under it. Why should the position be different if the board has unsuccessfully said that this was a contract which should be disclaimed? Why should there be a different procedure?

The words can, I think, be given effect while being limited to agreements made or varied on or after January 23, 1948: when Parliament came to consider this section, it had, I think, by sub-s. 3, covered the case of an application for repayment to the board when no question of disclaimer arises. By sub-s. 4, it had covered the case where the board had disclaimed and the disclaimer was not challenged. Then it was realized that there might be an agreement made or varied after January 22, 1948, where the board had sought to disclaim and the party had claimed his right under s. 22 to refer the matter of the disclaimer to the arbitration tribunal. Therefore it was natural to provide for cases where an agreement made or varied on or after January 23, 1948, had been referred to but not yet considered by the tribunal. I think that such provision is made by sub-s. 5, and that sub-section is concerned with the two matters which might be on their way to arbitration, and is providing that the tribunal's jurisdiction shall be exclusive. If that view is right, I think that it decides this appeal. Prima facie s. 36 is confined to agreements and transactions made and entered into on or after January 23, 1948. These words can be given meaning and effect within that limit. It would be wrong by giving them a wider meaning to oust the jurisdiction of the court.

Mr. Upjohn does not contend that if sub-s. 5 is limited by the relevant words in sub-s. 1 to agreements made or varied on or after January 23, 1948, we can do other than allow the appeal; but for myself I would like to say that I am not satisfied that the construction for which he contends with regard to sub-s. 5 (*a*) is necessarily right in its application to those agreements to which admittedly the words apply. I do not wish to express an opinion on a matter which we have not to decide. I say only that to my mind it is not clear. It is an open issue which may or may not have to be decided some day whether these words in para. (*a*) should not be confined to claims or disputes which arise out of the provisions of the Act and do not apply to a claim arising under the agreement and having nothing to do with the Act, as in a case such as this, where an agreement has been held to be of continuing effect as a legal agreement between the original party to it and the board instead of the undertaker. It is not clear to me that the tribunal is given exclusive jurisdiction to try claims of that kind which, as was pointed out in argument, might arise three or four years hence, long after the issue whether the agreement could or could not be disclaimed had been decided. For these reasons, I think that the appeal must be allowed.

DENNING, L.J. I agree with all that my Lord has said and I only add a few words in deference to the opinion of the judge. I start with the settled principle that the jurisdiction of these courts is not to be taken away except by clear words. I can find no such words in this Act. The opening sub-section of s. 36 defines the cases to which the whole section applies, and sub-s. 5 must, I think, be limited to those cases. The present case does not fall within them. The tribunal, therefore, has not exclusive jurisdiction over it. In confirmation of this view I would point out that these courts clearly have jurisdiction over agreements which are not disclaimed at all. The courts also have jurisdiction over agreements which are rightfully disclaimed when the disclaimer is not challenged by the other party: for even in those cases questions may arise as to past rights and liabilities which accrued before the disclaimer, or as to the effect of the disclaimer: and the courts alone have jurisdiction to determine those questions. It would be a strange thing if the courts had no jurisdiction when the agreements are wrongfully disclaimed. In my opinion the courts have jurisdiction to deal with this case, and the appeal should be allowed.

Appeal allowed.

Solicitors: *Timothy Hales; Slaughter and May.*

C. G. M.

Affirmed. H.L. [1951] 2 All E.R. 627

C. A.

HOLLOWAY *v.* MOBBERLEY AND PERRY LD.

1950
July 19, 28.

Bucknill, Somervell and Denning, L.JJ.

Workmen's Compensation—Pneumoconiosis—Employment as miner for thirty years to October, 1946—*Woodworker until May,* 1949—*Certification in August,* 1949, *as totally incapacitated from May,* 1949—*Claim to compensation—Workmen's Compensation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 47—*Coal Mining Industry (Pneumoconiosis) Compensation Scheme,* 1943—*National Insurance (Industrial Injuries) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 62), *s.* 89, *sub-s.* 1, *proviso* (*a*).

On August 29, 1949, in accordance with the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, made under s. 47 of the Workmen's Compensation Act, 1925, a medical board certified a workman as totally incapacitated by pneumoconiosis as from May 17, 1949. The workman claimed compensation from the employers with whom he had been engaged as a hewer in a coal mine for thirty years before October 11, 1946. From that month until May 15, 1949, he was employed in the woodworking industry and from that date he had done no work.

Held, that the workman was entitled to compensation from the employers, since his right to compensation arose in respect of employment before the appointed day—July 5, 1948—within the meaning of the first words in proviso (*a*) to sub-s. 1 of s. 89 of the National Insurance (Industrial Injuries) Act, 1946. His case did not come within the exception to that provision in the proviso, since, although pneumoconiosis was a disease prescribed for the purposes of Part IV of the Act of 1946, there were two conditions which must be fufilled to bring a workman within the exception: (1.) his right must arise on or after the appointed day; and (2.) the workman must be insured under the Act of 1946 against that disease. In this case the first condition was fulfilled, but the second was not, since, although he was insured under that Act in respect of his employment in the woodworking industry, his pneumoconiosis was not due to the nature of that employment, and so he was not insured against pneumoconiosis under the Act of 1946: see s. 55, sub-s. 1 of that Act.

Harris v. *Rotol Ld.* [1950] 2 K. B. 573, explained.

Per Denning, L.J. The employer must pay for compensation for accidents and diseases due to employment before July 5, 1948. The State must pay industrial benefit for accidents and disease due to employment after that date. No rights of the workman are taken away by the National Insurance (Industrial Injuries) Act, 1946. Certifying surgeons are not functi officio. They remain entitled to act after July 5, 1948, in respect of diseases due to employment before July 5, 1948. It is only when the workman has become insured against the incapacity due to the disease under the Act of 1946 that he loses his right to claim workmen's compensation from his employer and the certifying surgeons become functi officio. In one way or the other, the workman is entitled throughout, and the only question which arises in the transition period is who is to pay, the employer or the State? He cannot get

C. A.
1950

HOLLOWAY
v.
MOBBERLEY
AND
PERRY LD.

both workmen's compensation and industrial benefit, as the Court of Appeal decided in *Hales* v. *Bolton Leathers Ld.* [1950] 1 K. B. 493; but he does not lose both.

APPEAL from a judgment of His Honour Judge Langman, sitting at Stourbridge County Court.

The appellant workman, a miner, claimed compensation under the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, made under s. 47 of the Workmen's Compensation Act, 1925, as extended by later Acts, which applied to all workmen employed on or after July 1, 1943, in every operation underground in any coal mine. He was employed by the respondents as a hewer in a coal mine for more than thirty years before October 11, 1946. He was not after that date employed in any coal mine. From October, 1946, to May 15, 1949, he was employed in the woodworking industry, after which he did no work. The appointed day under the National Insurance (Industrial Injuries) Act, 1946, was July 5, 1948.

On August 29, 1949, a medical board certified him in accordance with the Pneumoconiosis Scheme as totally incapacitated by pneumoconiosis as from May 17, 1949. It was not disputed that, if the Act of 1925 and that scheme made under it applied to him, he was entitled to compensation under the scheme.

The provisions of the scheme are summarized in the judgment of Somervell, L.J.

The judge held that the Workmen's Compensation Act, 1925 and the Pneumoconiosis Scheme made under it did not apply to this workman and he dismissed the application.

The workman appealed.

Paull, K.C., *A. E. James* and *M. Gore* for the workman. The Workmen's Compensation Act, 1925, and the Pneumoconiosis Scheme applied to this workman, since the right to compensation arose in respect of employment before the appointed day—July 5, 1948—within the meaning of the first words in proviso (*a*) to sub-s. 1 of s. 89 of the National Insurance (Industrial Injuries) Act, 1946 (1). It is true that the exception provides that the Acts shall not apply in the case of a disease prescribed for the purposes of Part IV of the Act of 1946—and this pneumoconiosis was such a disease—even though the right to compensation is in respect of employment before the appointed day, if two conditions are fulfilled: (1.) that the right arises on or after the appointed day, and (2.) that the workman has been insured under the Act of 1946 against that disease. The first condition here was fulfilled, since, whether the date of the certificate, August 29, 1949, or that of the disablement, May 17, 1949, be taken as the date when the right arose, it was after the appointed day—July 5, 1948. But the second condition is not fulfilled: this workman was insured under the Act of 1946, in respect of his employment in the woodworking industry, from July 5, 1948, to May, 1949; but, since his pneumoconiosis was not due to the nature of that employment, he was not insured against pneumoconiosis: see s. 55, sub-s. 1 of the Act of 1946.

---

(1) National Insurance (Industrial Injuries) Act, 1946, s. 89, sub-s. 1: "Workmen's compensation shall not "be payable in respect of any employ-"ment on or after the appointed day, "and accordingly" the Workmen's Compensation Acts "are hereby re-"pealed as from that day. . . . "Provided that" (*a*) those Acts "shall continue to apply to cases to "which they would have applied if "this Act had not been passed, being "cases where a right to compensation "arises or has arisen in respect of "employment before the appointed "day, except where, in the case of a "disease or injury prescribed for the "purposes of Part IV of this Act, "the right does not arise before the "appointed day, and the workman, "before it does arise, has been insured "under this Act against that disease "or injury".

The case, therefore, not coming within the exception, falls within the earlier words of proviso (*a*) whereby the Workmen's Compensation Acts " shall continue to apply to cases to which " they would have applied if this Act had not been passed, being " cases where a right to compensation arises or has arisen *in* " *respect of employment before the appointed day* ". This means that the Acts apply to cases where the right to compensation arises after the appointed day, if it is in respect of employment before the appointed day: *Hales* v. *Bolton Leathers Ld.* (2).

In *Harris* v. *Rotol Ld.* (3) the facts were not stated in the judgment since they were never proved. The employers, making no admission as to facts, raised a preliminary objection, without any evidence being heard, on the ground that the workman's right to compensation did not exist until a certificate was given by a certifying surgeon and that, since that certificate was not given until after the appointed day, the workman had no right to compensation. The county court judge upheld the objection, saying that on August 17, 1949, when the certificate was given, s. 43 of the Act of 1945 no longer existed and that on July 5, 1948, the certifying surgeon was functus officio, so far as the Act of 1925 was concerned, and could thenceforward give no certificate under that Act. The Court of Appeal held that, since s. 43 of the Act of 1925 made the certificate a condition precedent, no right arose until it was given. If, therefore, as was assumed or admitted, the workman was before December, 1948, insured under the Act of 1946 against dermatitis, the case came within the exception to the first words of proviso (*a*) to sub-s. 1 of s. 89. The case came within the exception, since dermatitis was a disease prescribed for the purpose of Part IV of the Act of 1946

(2) [1950] 1 K. B. 493.

(3) [1950] 2 K. B. 573.

and both conditions were fulfilled: the right arose after the appointed day and the workman had been insured under the Act of 1946 against that disease. That is all that *Harris* v. *Rotol Ld.* (4) decided.

Beney, K.C., and *E. G. H. Beresford* for the employers. The certificate in this case was not given before August 29, 1949—that is, after the appointed day, July 5, 1948. Therefore no right to compensation arose at all, since the Workmen's Compensation Acts were repealed as from the appointed day with their apparatus for certifying disease: *Harris* v. *Rotol Ld.* (4). In that case the Court of Appeal decided that the certifying surgeon on August 17, 1949, the date when he gave his certificate was functus officio. Accordingly, the case does not come within the terms of proviso (*a*) to s. 89, sub-s. 1. The Court of Appeal will follow its own decision, and this case does not come within any of the exceptions to that rule set out in *Young* v. *Bristol Aeroplane Co., Ld.* (5). *Harris* v. *Rotol Ld.* (6) was neither argued nor decided on the exception to proviso (*a*) to sub-s. 1 of s. 89.

J. P. Ashworth, holding a watching brief for the Minister of National Insurance as amicus curiae, at the invitation of the court. If the argument for the employers is right, there is a gap or hiatus where a workman who has suffered from accident or disease within the meaning of the Workmen's Compensation Acts cannot recover either compensation under the Acts or benefit under the National Insurance (Industrial Injuries) Act, 1946. It is submitted that this hiatus cannot be closed by any regulation made by the Minister of National Insurance.

Cur adv. vult.

July 28. The following judgments were read:—

Somervell, L.J., [read by Denning, L.J.]. This is an appeal by a workman claiming compensation under the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, made under s. 47 of the Workmen's Compensation Act, 1925, as extended by later Acts. It is unnecessary to refer to s. 47 which gives, or the later Acts which extend, the power to make the scheme in question. The scheme applies to all workmen employed on or after July 1, 1943, in any operation underground in any coal mine.

His Lordship stated the facts and continued: The National Insurance (Industrial Injuries) Act, 1946, as from the appointed day, July 5, 1948, repealed the Workmen's Compensation Acts, including, of course, schemes under the Acts, and substituted new provisions for industrial injuries, the terms of which are to be found in that Act. It provided, however, in s. 89 that the Workmen's Compensation Acts should continue to apply in certain cases, and the question is whether the workman's case is one to which they continue to apply. The county court judge decided that it was not and from that decision the workman appealed.

---

(4) [1950] 2 K. B. 573.
(5) [1944] K. B. 718.
(6) [1950] 2 K. B. 573.

The scheme follows the general lines on which industrial diseases are dealt with under the old code. It provides (para. 4) for certification by a medical board as to whether death, total or partial disablement is due to the industrial diseases covered by the scheme. Where the disease is due to employment in the industry the workman or his dependants are entitled to claim compensation as if the disease were a personal injury by accident as provided by the Acts. If, as here, the workman has been employed in the industry for five years or more the disease is deemed to be due to the employment, unless the employer proves the contrary. The date of the injury is deemed to be the date on or from which the man is certified to be disabled. The compensation is recoverable from the employer who last employed the workman in the industry. Other employers, if any, who had employed the workman in the industry during the five years preceding the date of the injury are, subject to qualifications which do not matter, liable to make contributions to the last employer from whom the compensation was recoverable. I have set out these provisions because they assist in understanding the form of the transitional provisions of this new Act, which have to be applied.

This appeal turns on s. 89, sub-s. 1 of the National Insurance (Industrial Injuries) Act, 1946.

[His Lordship read the section and continued:—]

To consider first the words before the proviso is reached, the workman was on the appointed day and up to May 15, 1949, employed in the woodworking industry. If he had sustained a personal injury in that industry after the appointed day the Workmen's Compensation Acts would have had no application. Under s. 1 of the Act of 1946 he could have claimed his benefit. I will now turn to the proviso. This proviso came before this court in *Hales* v. *Bolton Leathers Ld.* (7). The exact point argued does not affect the present case. The Court of Appeal held that the words down to the exception in the proviso continue to apply the Workmen's Compensation Acts to cases where the right to compensation arises after the appointed day if it is in respect of employment before the appointed day. That case, like this, turned on the exception. It is not disputed that pneumoconiosis is a disease or injury prescribed for the purposes of Part IV of the Act of 1946. The exception is providing that the Workmen's Compensation Acts shall not continue to apply even though the right to compensation is in respect of employment before the appointed day if two conditions are fulfilled: (1.) the right does not arise before, that is, arises on or after the appointed day, and (2.) the workman has been insured under the Act of 1946 against that disease or injury.

---

(7) [1950] 1 K. B. 493.

In the present case it seems to me plain that the workman's right to compensation arose in respect of employment before the appointed day. The employment to which the disease was due ceased in October, 1946. For reasons which we elaborated in *Hales's* case (7), "arises" means "arises at any time", so unless taken out by the exception, the appeal must succeed. The first condition of the exception is fulfilled as the workman's right to compensation arose after the appointed day whether one takes the date of the certificate or that of the disablement. To see whether the second is fulfilled it is necessary to turn to s. 55, sub-s. 1, which reads as follows: "Subject to the provisions of "this Part of this Act, a person who is under this Act insured "against personal injury caused by accident arising out of and "in the course of his employment shall be insured also against "any prescribed disease and against any prescribed personal "injury not so caused, being a disease or injury due to the "nature of that employment and developed on or after the "appointed day." As I have said the workman was insured in respect of his employment in the woodworking industry, but as his pneumoconiosis was not due to the nature of *that* employment he was not insured against pneumoconiosis under the Act of 1946. The second condition is not fulfilled, and under the opening words of the proviso to s. 89, sub-s. 1, the Workmen's Compensation Acts continue to apply.

This, broadly, was the argument as presented by Mr. Paull for the workman, and it seems to me plainly right unless we are constrained by authority to hold otherwise. If one asks oneself why it was necessary to have an exception, it was, I think, because an industrial disease is "in respect of employment" over a long period and complications would have arisen in the application of the opening words, for example, to a miner employed as such, after the appointed day who developed pneumoconiosis, say, a year after that date.

The authority relied on by the employers is a decision of this court, *Harris* v. *Rotol Ld.* (8). In that case the workman was certified on August 17, 1949, under s. 43 of the Act of 1925 as disabled by dermatitis as from February 6, 1948, before the appointed day. It would seem clear that the right arose in respect of employment before the appointed day. The employers took a preliminary objection based on the repeal of the Workmen's Compensation Acts by the opening words of s. 89, sub-s. 1. The employers sought to argue, in the first place, that the case was outside the opening words of the proviso to the sub-section. This seems to me clearly contrary to what was said in *Hales's* case (9). There was, however, scope for argument, and this seems to me to have been the only point argued, whether the first condition of the exception was fulfilled. In other words, as there is power to give a retrospective certificate of disablement does the right to compensation arise when the certificate is signed or as from the certified date of disablement? The court held that as s. 43 made the certificate a condition precedent, no right arose till it was given. The right to compensation, therefore, did not arise before the appointed day. It is a binding decision on this point, and if the workman had been insured under the Act of 1946 against dermatitis would have defeated his claim, and the surgeon would have been functus officio. I can find no discussion on the question whether the workman was insured under the Act of 1946 against dermatitis. It may have been admitted or tacitly assumed that he was. It was, I think, unsatisfactory that the employers were allowed to take a preliminary objection, as in deciding whether s. 89, sub-s. 1 continues the application of the Workmen's Compensation Act, 1925, the history of the workman and his employment on and after the appointed day is relevant. I cannot regard the case as deciding anything beyond the point which emerges in the judgment.

---

(8) [1950] 2 K. B. 573.

For these reasons I think that the appeal succeeds.

DENNING, L.J. I agree so entirely with the judgment of Somervell, L.J., that I would not add a word but for the difficulties presented by *Harris* v. *Rotol Ld.* (10). That case came before the court in a most unusual way. The claim was for compensation for incapacity which started in December, 1948. The employers took a preliminary objection. They said that the "workman's right to claim compensation did not arise before "July 5, 1948" and "therefore" the employers are not liable to pay compensation under the Workmen's Compensation Act. That preliminary objection was upheld without any evidence being heard. So far as can be told from the record the incapacity in December, 1948, was a recurrence due to the nature of his employment from July 5, 1948, to December, 1948, against which

(9) [1950] 1 K. B. 493.

(10) [1950] 2 K. B. 573.

he was insured by the State. The case was, therefore, on the face of it, covered by *Hales* v. *Bolton Leathers Ld.* (11), that is, the workman was entitled to industrial insurance from the State, not to workmen's compensation from the employers. I do not think the case should be regarded as deciding any more than appears from the record. The only point that it decided was that the right to compensation under s. 43 of the Act of 1925 only arises when the certifying surgeon gives his certificate and not before. If, therefore, as was assumed, the workman was before December, 1948, insured by the State against the disease, the case came within the exception to proviso (*a*) to sub-s. 1 of s. 89.

The judgment of this court in *Harris* v. *Rotol Ld.* (12) does not recite the facts at all, no doubt because they were not proved. It is, however, instructive to consider the hypothetical set of facts which were stated to the court. On February 6, 1948, the workman, who had theretofore been working with oil, had an attack of dermatitis. He did not, however, stop work. He had his hands bandaged and was put on light dry work at slightly less wages than before. Later on he was appointed an inspector and was engaged on work which did not bring him into contact with oil. In December, 1948, he had a recurrence of dermatitis and was totally incapacitated. On August 17, 1949, the certifying surgeon certified that he was suffering from dermatitis and that the date of his disablement was February 6, 1948.

If those facts had been proved, two questions might have arisen for decision which were not in fact decided: first, was the workman entitled to workmen's compensation from his employers for the period of partial incapacity which started on February 6, 1948? The answer, I think, was plainly "Yes". Although the right to it did not arise until August 17, 1949, when the certifying surgeon gave his certificate, nevertheless the right arose "in respect of employment" before July 5, 1948. The case came, therefore, within the opening words of s. 89, sub-s. 1, proviso (*a*), of the Act of 1946. It did not come within the exception because, although the right did not arise before July 5, 1948, nevertheless the workman was not insured against the disease, that is, the incapacity due to the disease, under the Act of 1946.

The second question is whether the recurrence in December, 1948, was due to the nature of his employment from July 5, 1948, to December, 1948, or only to his employment before July 5, 1948? If it was in fact due to his work with oil prior to February, 1948, and his subsequent work had nothing to do with it, then the very

---

(11) [1950] 1 K. B. 493.

(12) [1950] 2 K. B. 573.

C. A.
1950

HOLLOWAY
v.
MOBBERLEY
AND
PERRY LD.

Denning, L.J.

point would have arisen which we have to decide today. The answer again is plain: although the right did not arise until the certifying surgeon gave his certificate in August, 1949, nevertheless the right arose "in respect of employment" before July 5, 1948. The case would come within the opening words of the proviso. It would not come within the exception because, although the right did not arise before July 5, 1948, nevertheless the workman was not insured against the disease, that is, the incapacity due to the disease, under the Act of 1946.

The answers which I have given clearly carry out the intention of the Act of 1946 which was, as stated in s. 89 itself, that "workmen's compensation shall not be payable in respect of any "employment on or after the appointed day"—July 5, 1948—but should continue to be payable in respect of employment before it. The date when the right arose does not matter so much as the employment in respect of which it arose. The employer must pay compensation for accidents and diseases due to employment before July 5, 1948. The State must pay industrial benefit for accidents and diseases due to employment after July 5, 1948. No rights of the man are taken away by the Act of 1946. The certifying surgeons are not functi officio. They remain entitled to act after July 5, 1948, in respect of diseases due to employment before July 5, 1948. It is only when the man has become insured against the incapacity due to the disease under the National Insurance Act, 1946, that he loses his right to claim workmen's compensation from his employer and the certifying surgeons become functi officio. In one way or the other the man is entitled throughout, and the only question which arises in the transition period is: who is to pay, the employer or the State? He cannot get both workmen's compensation and industrial benefit, as we decided in *Hales* v. *Bolton Leathers Ld.* (13); but he does not lose both, as we decide today. In my opinion, therefore, the appeal should be allowed.

BUCKNILL, L.J. I also agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Stafford Clarke & Co. for Hooper & Fairbairn, Dudley; E. P. Rugg & Co. for Buller, Jefferies & Kenshole, Birmingham.*

C. G. M.

---

(13) [1950] 1 K. B. 493.

WESTWOOD *v.* CANN.

1950
Oct. 3.

Pritchard, J.

Varied. [1952] 2 Q.B. 887

Plate—Gold and silver wares—Hall-mark—Statutory standards of fineness—Statutory requirement of hall-mark—Application to wedding rings and silver cigarette case—"Carat"—Meaning—Plate Act, 1696 (8 *&* 9 *Will.* 3, *c.* 8), *s.* 9—*Plate Duty Act,* 1719 (6 *Geo.* 1, *c.* 11), *s.* 3—*Plate* (*Offences*) *Act,* 1738 (12 *Geo.* 2, *c.* 26), *ss.* 1, 5, 6, 22—*Gold Plate* (*Standard*) *Act,* 1798 (38 *Geo.* 3, *c.* 69), *ss.* 1, 2, 4, 6—*Gold and Silver Wares Act,* 1854 (17 *&* 18 *Vict. c.* 96), *ss.* 1, 4—*Wedding Rings Act,* 1855 (18 *&* 19 *Vict. c.* 60), *s.* 1—*Gold Wares* (*Standard of Fineness*) *Order,* 1932 (*St. R. & O.* 1932, *No.* 654).

It is lawful to make gold wedding rings of any of the four statutory standards of fineness for gold wares made of industrial gold alloy—namely, 22- 18- 14- and 9-carat—and the effect of the Wedding Rings Act, 1855, is that a wedding ring made of industrial gold alloy of any of those four standards must bear an appropriate hall-mark.

Meaning of "carat" considered.

ACTION.

The defendant was a jeweller carrying on business in Manchester. He exposed to sale in his shop twenty-seven wedding rings all made in the twentieth century and a silver cigarette case made since 1739. None of the rings bore the hall-mark of a British assay office. The cigarette case was less in fineness than 11 ounces 2 pennyweight of fine silver in every pound weight troy and bore no hall-mark.

The plaintiff claimed from the defendant penalties in respect of the rings and the cigarette case on the ground that they were not of the standard of fineness permitted by law and did not bear appropriate hall-marks, and also forfeiture of the cigarette case. The plaintiff claimed, in particular, in respect of each ring the penalty of 50*l.* imposed by s. 6 of the Gold Plate (Standard) Act, 1798, on any person who after October 1, 1798, made, sold or exposed to sale gold wares not duly marked with a hall-mark.

H. I. Nelson, K.C., and *Wingate-Saul* for the plaintiff.
Blackledge, K.C., and *Heilpern* for the defendant.

Cur. adv. vult.

Oct. 3. PRITCHARD, J., read the following judgment in which, after considering the evidence and finding facts as stated above, he continued:—In order to understand the expert evidence about the gold wedding rings it is necessary to say something about the two words "alloy" and "carat". The word "alloy", if given its scientific meaning, means "a mixture of metals not being a "mechanical mixture nor an amalgam"; but the word has another meaning which—for the want of a better title—I may call its "legal" meaning, namely, "the allowed addition to "gold or to silver of base metal". The meaning of the word "carat" is important and occasioned some confusion during the trial because the word is used in some of the material statutes in a context which the plaintiff and the assayer called on his behalf admitted they did not understand.

This case was tried at Manchester in the last week of a busy summer assize, and owing to circumstances over which counsel on both sides had little control they were not able to cite to me any authorities or opinions likely to be illuminating on this subject. Since the trial, however, I have had opportunity to refer to various text-books, among them being J. Paul de Castro's Law and Practice of Hall-Marking Gold and Silver Wares (1926), where (at p. 143) is to be found a useful glossary setting out on the subject of the word "carat" a long quotation from Sir William Roberts-Austen's Cantor Lectures of 1884. From this it appears that the carat system of weights, on which the computation of the standard fineness of alloys of gold is based, is historically obscure but that the origin of the "carat" is Grecian. The *ceratium* was a small Greek weight. Its use came to us through Arabian alchemists or through the Roman mints, and it seems probable that the Greek *Keration* and the Arab *Kyvat* were applied to beans or seeds by native merchants, who made them serve provisionally as weights. If this view is correct, the original conception connoted by the word "carat" is the conception of weight.

This is not the conception connoted by the word as used by the witnesses in this case. They told me that the sense in which they used the word was to imply a twenty-fourth part of a whole, and although, of course, a twenty-fourth part must have a weight, they used the word as meaning or implying not weight but proportion. According to them, pure, fine or unalloyed gold is denoted as 24-carat gold, which means that all twenty-four parts of a given whole would be gold. 24-carat gold, however, is too soft a material from which to manufacture wares, and therefore various statutes have from time to time permitted various wares to be manufactured from lower standards which the witnesses described as follows: first, 22-carat gold, or 22 parts gold in 24 parts alloy; second, 18-carat gold, or 18 parts gold in 24 parts alloy; third, 14-carat gold, or 14 parts gold in 24 parts alloy; fourth, 9-carat gold, or 9 parts gold in 24 parts alloy. From the legal point of view material below the 9-carat standard is properly described as base metal.

Applying that conception of these standards to the rings now in question, the result of the evidence in this case is as follows:

twenty-one rings were below the 9-carat standard; four rings were above the 9-carat standard, but below the 14-carat standard; one ring was of the 14-carat standard; and one ring was above the 18-carat standard, but below the 22-carat standard. Moreover, none of these twenty-seven rings bore the hall-mark of a British assay office.

The plaintiff claimed to be entitled to recover from the defendant the penalties imposed by law on a person who exposes to sale gold wedding rings which (a) fall short of the legal standard of fineness, or (b) are not marked as required by law. Therefore it is now necessary to turn to the various statutes which lay down the required standard of fineness and which demand that wares should be appropriately marked. Three material statutes deal with the permitted standards for industrial gold alloys—the Plate (Offences) Act, 1738, the Gold Plate (Standard) Act, 1798, and the Gold and Silver Wares Act, 1854.

The Plate (Offences) Act, 1738, is entitled, "An Act for the "better preventing frauds and abuses in gold and silver wares", and its material sections for the purposes of this case are ss. 1, 5, 6 and 22. Section 1 forbids any gold plate or manufacture to be made, sold or exposed to sale after May 28, 1739, if it is less in fineness than 22 carats of fine gold in every pound weight troy; and imposes for every offence against this prohibition a penalty of 10*l.*, or imprisonment for six months in default of payment.

Section 5 concerns the marking of such 22-carat gold wares, and provides that from May 28, 1739, no gold plate or manufacture made after that date shall be sold or exposed to sale unless it (being of the standard above referred to) is marked as provided in the section. For the purposes of this case it will suffice if I refer to this mark as "the 22-carat mark". The section imposed the same penalty for offences against it as that imposed by s. 1.

Section 6 contains a list of wares which are excepted from the requirements of s. 5. The list includes "rings". Immediately after May 28, 1739, therefore, gold rings, although they could not lawfully be made less in fineness than the 22-carat standard, could lawfully be sold or exposed to sale without the 22-carat mark. Section 22 provides that the penalties imposed by the Act shall and may be recovered with full costs of suit by action in His Majesty's courts of record at Westminster; and that one half of such penalties shall go to the Crown and the other half to the person who shall sue for them.

The Gold Plate (Standard) Act, 1798, is entitled, "An Act "for allowing gold wares to be manufactured at a standard lower "than is now allowed by law". Its material sections for the purposes of this case are ss. 1, 2, 4 and 6. Section 4 preserved the legality of making, selling and exposing to sale gold wares of the 22-carat standard, but s. 1 made it lawful after October 1, 1798, to make, sell or expose to sale gold wares of the standard of 18 carats of fine gold in every pound weight troy. Section 2 provided a new mark for the newly permitted 18-carat standard. I shall call this mark " the 18-carat mark ". The section provided that after October 1, 1798, gold wares made after that date of the newly permitted 18-carat standard must not be sold or exposed to sale until they had been marked with the 18-carat mark instead of with the 22-carat mark; and for every offence against that provision a penalty of 10*l*. was made recoverable.

Section 6, which at first sight seems closely to resemble s. 2, is I think different, and is aimed at a different evil. In 1798 there must have been in existence a number of 22-carat marks which had been in use since 1738. The object of s. 2 was to ensure that the new 18-carat marks should be used for the newly permitted 18-carat wares. It was conceivable, of course, that a trader might inadvertently offer for sale a piece of gold plate of the newly permitted 18-carat standard marked with the 22-carat mark. In any event—whether he acted inadvertently or intentionally—the degree to which a buyer could be deceived in such circumstances was measurable by the difference of four carats in fineness. To check this evil the legislature imposed a penalty of 10*l*. But, of course, there were still the traders who were prepared to offer for sale gold wares of less fineness than either of the then permitted standards and to sell as gold that which was legally mere base metal, possibly avoiding the consequences of making false pretences by failing to have any mark at all on the wares which they were offering for sale. It was this evil, with its far greater opportunities for fraud, which I think the legislature had in mind when by s. 6 it imposed a penalty of 50*l*. on any person who, after October 1, 1798, made or sold or exposed to sale any gold wares not being duly marked either with the 22-carat mark or with the 18-carat mark; those being immediately after October 1, 1798, the only two standards permitted by law. Such, then, was the statutory position at the end of the eighteenth century.

The Gold and Silver Wares Act, 1854, by s. 1, enables the Crown by orders in council from time to time to order that gold wares may be wrought of any standard, not being less than one-third part in the whole of fine gold, to be declared in any such order, and also to approve thereby of the instrument with which gold plate and manufacture shall be marked or stamped, setting forth in figures the actual fineness thereof, according to the standard so declared. By s. 4 it is provided that the statutes then in force relating to standards of gold wares or to the marks for denoting the same and all the provisions, prohibitions, penalties and forfeitures enacted thereby shall continue in force and be construed with and as forming part of the Act, save only that in the interpretation thereof all standards authorized by the Crown in pursuance of the Act shall be deemed and taken to be lawful standards.

In pursuance of this Act, and four months after it came into force, an order in council dated December 11, 1854, declared that from and after that date gold plate and manufacture might be wrought of three new standards, namely, 15, 12 and 9 carats of fine gold in every pound weight troy; and the order also specified three several dies or instruments with which gold plate and manufactures of the three new standards should be marked or stamped. The order of 1854 subsisted for seventy-eight years, but it was revoked by the Gold Wares (Standard of Fineness) Order, 1932, which provides in language not previously employed in the Acts to which I have referred that gold plate or manufacture of gold may from August 15, 1932, be wrought of either (i) the standard of 585 parts of fine gold in every 1,000 parts by weight (called the standard of 14-carats) or (ii) the standard of 375 parts of fine gold in every 1,000 parts by weight (called the standard of 9-carats); and the order specifies the marks by which gold wares of these two standards shall be marked, which I will call respectively the 14- and the 9-carat marks.

Therefore today there are four statutory standards for industrial gold alloys in force in England which authorized assay offices will mark with appropriate hall-marks when fashioned into wares, namely, (1.) the 22-carat standard created by the Plate (Offences) Act, 1738; (2.) the 18-carat standard created by the Gold Plate (Standard) Act, 1798; (3.) the 14-carat standard; and (4.) the 9-carat standard—these last two being created by the Gold Wares (Standard of Fineness) Order, 1932, made under and by virtue of the Gold and Silver Wares Act, 1854.

In so far as the plaintiff's claim alleges that the wedding rings were less in fineness than a standard permitted by law, the allegation is to be found in a paragraph of the statement of claim where the words used are " less in fineness than 9 carats of fine " gold in every pound weight troy ". In using these words the pleader (who, I ought to say, was not the junior counsel who appeared for the plaintiff at the trial) seems to have overlooked the revocation of the order of 1854 and to have added to his allegation that the rings were less in fineness than the 9-carat standard the words " in every pound weight troy ", which do not appear in the order of 1932, but which do appear in the Acts of 1738 and 1798 and the order of 1854. It was in this context that, as I have already indicated, the witnesses confessed that they did not understand the word " carat ". In view of their evidence counsel for the plaintiff candidly admitted that he felt a difficulty in proving the allegation as pleaded, and ultimately, after some argument about an adjournment which at one time he asked me to grant, he withdrew the claim for penalties in so far as it was based upon the allegation that the rings were not of one of the permitted standards of fineness.

In these circumstances I need not consider further this part of the case; and I pass from it with the comment that in view of the evidence it seems possible that between 1854 and 1932 there was a change in the methods used and the terminology employed by those who carry on the profession of assayers of gold, which has been reflected in the order of 1932 and in accordance with which for the sake of uniformity and simplicity the language used to describe the standards of 22- and 18-carat in the Acts of 1738 and 1798 might well be amended.

The other allegation in connexion with the rings which is made in the statement of claim is that they were not marked with one of the marks by law required to denote one of the standards of fine gold, and on this ground the plaintiff claims in respect of each ring so found not to have been marked the penalty of 50*l.* imposed by s. 6 of the Gold Plate (Standard) Act, 1798. This claim involves consideration of the question whether the four statutory standards for industrial gold alloys, to which I have already referred, and the complementary statutory requirements that wares made in accordance with such standards should be appropriately marked, have been made to apply to wedding rings.

As I have already said, by s. 6 of the Plate (Offences) Act, 1738, rings (including wedding rings) were excepted from the provisions of s. 5 of that Act, and this excepting of wedding rings from the necessity of being marked was not altered by the Gold Plate (Standard) Act, 1798. Thus, at the end of the eighteenth century, although wedding rings, like other gold wares, had to be of either the 22- or the 18-carat standard, unlike other gold wares of those standards, wedding rings of those standards could lawfully be offered for sale although unmarked.

When the Gold and Silver Wares Act, 1854, permitted the lowering by orders in council of the permitted standards for the making of gold wares, it applied the existing law to gold wares which might be made of the newly permitted standards; but it left untouched the existing exemption of wedding rings from being marked. That this was so is made clear beyond doubt by the preamble to an Act passed in the following year, the Wedding Rings Act, 1855. From this preamble it appears that although according to the existing law wedding rings were not liable to be assayed and marked, nevertheless in practice gold wedding rings had been assayed and marked, and it was therefore expedient that such rings should be made liable to the provisions of the statutes then in force relating to the assaying and marking of gold plate. The Act of 1855 then proceeded by s. 1 to do what was said to be expedient, and removed gold wedding rings from the exception which had been created by and maintained since the passing of s. 6 of the Plate (Offences) Act, 1738.

Counsel for the defendant, reading the Wedding Rings Act, 1855, from Halsbury's Complete Statutes of England (1st ed.), vol. 19, p. 831, argued that that Act had exempted gold wedding rings from the operation of the Gold and Silver Wares Act, 1854, because the Act of 1855 is entitled: "An Act for "excepting gold wedding rings from the operation of the Act of "the last session relating to the standard of gold and silver wares, "and from the exemptions contained in other Acts relating to "gold wares". He submitted that in these circumstances the state of the law today is that it is not lawful to make gold wedding rings below the 18-carat standard, and that therefore any gold wedding rings below that standard cannot come within the statutory provisions relating to the marking of gold plate. This argument, which if successful would cause consternation to many donors and recipients of the gold nuptial emblem, is, in my judgment, without foundation. Counsel overlooked the fact, I think, that the Complete Statutes of England are, in a sense, incomplete. The volumes published under this title do not reproduce sections which have been repealed. In the case of the Wedding Rings Act, 1855, only the first section is printed in the volume to which I have referred. Reference to the Act in the Statutes at Large shows that the only part of the Act of 1854 from which gold wedding rings were excepted by the Act of 1855 was s. 3 of the Act of 1854 relating to the duty levied upon gold plate with which subject this case is not concerned. That immaterial exception was effected by s. 2 of the Act of 1855, which in its turn was repealed by the Statute Law Revision Act, 1875.

I therefore reject that submission and hold that, as a result of the various statutes and orders in council to which I have referred, gold wedding rings are now in no different position from other gold plate or manufacture of gold; that they may lawfully be made of any of the four standards permitted by law (namely, the standards of 22- 18- 14- and 9-carats); and that if so made they must not be offered for sale unless appropriately marked as provided respectively by the relevant statute or order. In my judgment there can be no real doubt about this, but if authority is needed I think that what I have decided is consistent with the charge to the jury which Manisty, J., gave in *Buckley* v. *Alexander* which was tried at Birmingham Assizes on March 26 and 27, 1889, the report of which in the *Birmingham Daily Post* has been made available for me.

The result of my findings, therefore, is as follows:—The defendant offered for sale twenty-seven rings. Of those rings twenty-one were below the 9-carat standard. In respect of those twenty-one rings therefore no offence against any statute with which this case is concerned was committed by reason of their having been offered for sale unmarked. They were legally mere base metal. Of the remaining six rings one was above the standard of 18-carat but below the 22-carat standard and ought not to have been offered for sale unless marked accordingly in compliance with the Gold Plate (Standard) Act, 1798; one was of the 14-carat standard, and four were above the 9-carat standard but below the 14-carat standard and these five ought not to have been offered for sale unless marked accordingly in compliance with the Gold Wares (Standard of Fineness) Order, 1932, made under the Gold and Silver Wares Act, 1854. None of these six rings bore any hall-mark, and therefore in respect of each of them the plaintiff has established his claim to recover the penalty of 50*l.* imposed by s. 6 of the Gold Plate (Standard) Act, 1798. I have already mentioned the circumstances in which the plaintiff withdrew his claim for penalties based on the standard of fineness of the rings, and it follows that the sum to which the plaintiff is entitled in respect of the rings is 300*l.*

I now turn to consider the claims which the plaintiff makes in respect of the silver cigarette case. By s. 1 of the Plate (Offences) Act, 1738, it is an offence to expose to sale any silver plate or manufacture, made after May 28, 1739, less in fineness than 11 ounces 2 pennyweight of fine silver in every pound weight troy. The evidence being that the cigarette case was below that statutory standard, the defendant, having offered it for sale, becomes liable to forfeit 10*l.*, the penalty fixed by s. 1 of the Plate (Offences) Act, 1738.

The plaintiff also claims in respect of the cigarette case a further sum of 10*l.* as the penalty which he says is due under s. 5 of the same Act, on the ground that the defendant offered the article for sale when it did not bear the mark prescribed by that section. In my judgment this claim is misconceived. The silver wares which by s. 5 are required to be marked before being offered to sale are silver wares which comply with the standard laid down by s. 1. This cigarette case did not comply with that standard and in these circumstances s. 5 does not apply to it because s. 5 only applies in terms to silver wares "being of the "standard of 11 ounces 2 pennyweight of fine silver per pound "weight troy". The plaintiff's claim for 10*l.*, under s. 5, must therefore fail.

Finally, the plaintiff claims the forfeiture of the cigarette case itself or its value on the ground that it was offered for sale by the defendant without having been assayed and marked as required by law. The plaintiff bases this claim on s. 9 of the

Plate Act, 1696, entitled: "An Act for incouraging the bringing "in wrought plate to be coined", as amended by s. 3 of the Plate Duty Act, 1719. I have considered these two sections and in my judgment they differ from s. 5 of the Plate (Offences) Act, 1738, in this respect: whereas that section only required to be marked before being offered for sale plate which was in accordance with the standards of gold and silver wares permitted by that Act, the two sections which I am now considering required all silver plate to be marked before being offered to sale, whether it was of the standards permitted by those sections or not. In these circumstances, the cigarette case in question having been offered for sale unmarked, the plaintiff has established his claim to its forfeiture. No argument was addressed to me on this part of the case and no evidence was given as to the value of the cigarette case; and accordingly I order that that article itself be forfeited to the plaintiff.

In addition, and for the reasons which I have given, there must be judgment in favour of the plaintiff for 310*l*.

Judgment for plaintiff.

Solicitors: *Sharpe, Pritchard and Co., for Ryland, Martineau and Co., Birmingham; Leslie M. Lever and Co., Manchester.*

R. P. C.

NEWMAN *v.* LIPMAN.

1950 *Oct.* 6.

Lord Goddard, C.J., Byrne and Ormerod, JJ.

Local government—Metropolis—Street trading—"Offering for sale" of article—Street photographer without licence—Agreement to sell photograph—Meaning of "offer"—London County Council (General Powers) Act, 1947 (10 *&* 11 *Geo.* 6, *c. xlvi*), *s.* 15, *sub-s.* 1; *s.* 17, *sub-s.* 2; *s.* 29, *sub-s.* 1 (*a*).

It is not "street trading" within the definitions in s. 15, sub-s. 1, and s. 17, sub-s. 2, of the London County Council (General Powers) Act, 1947, to offer, in a street, to sell an article which is not there in the street, for it is not the "offering for sale of any article in a "street".

Where, therefore, a street photographer photographed a woman in a street and agreed there to sell her the completed photograph, she paying a deposit and the balance of the purchase price being payable when the photograph was delivered to her later,

Held, that he was not engaged in "street trading" within the meaning of the Act.

MacIver v. *Robertson* (High Court of Justiciary, May 25, 1950, *post*, p. 338) not followed.

1950

NEWMAN v. LIPMAN.

CASE STATED by a metropolitan magistrate.

An information was preferred against the defendant charging him with engaging in street trading from a stationary position contrary to s. 29, sub-s. 1 (*a*) of the London County Council (General Powers) Act, 1947 (1).

The following facts were proved or admitted before the magistrate.

The defendant was in Trafalgar Square, a street within the meaning of s. 29, sub-s. 1 (*a*), of the Act of 1947, carrying a portable hand camera and soliciting passers-by to have their photographs taken by him. He photographed a woman passing and received from her a sum of money and gave to her a receipt or voucher for it. He was in a stationary position when he photographed her and received money from her. He received that money by way of deposit for and on account of the price of the completed photograph, which was not delivered in the street but which he was subsequently to post to her. The defendant was not on that day authorized by a street-trading licence to engage in street trading there.

The magistrate dismissed the information, being of opinion that the defendant's acts were not "street trading" within the meaning of s. 29, sub-s. 1 (*a*), and as defined by s. 15, sub-s. 1, and s. 17, sub-s. 2, of the London County Council (General Powers) Act, 1947, in that he was not occupying the "stationary "position" contemplated by s. 17, sub-s. 2, of the Act and was not "selling or exposing or offering for sale . . . any article or thing".

The prosecutor appealed.

Arthian Davies, *K.C.*, and *Sebag Shaw* for the prosecution. The defendant "offered for sale" an article—namely a photograph—in a street: see the Scottish case, *MacIver* v. *Robertson* (2). He was therefore engaged in "street trading" within the definitions in s. 15, sub-s. 1, and s. 17, sub-s. 2, of the London County Council (General Powers) Act, 1947, and should have been convicted under s. 29, sub-s. 1 (*a*).

---

(1) London County Council (General Powers) Act, 1947, s. 15, sub-s. 1: ". . . 'street trading' means the "selling or exposing or offering for "sale of any article or thing in a "street".

Section 17, sub-s. 2: "For the pur- "pose of this Part of this Act a person "shall be deemed to engage in street "trading on any occasion on which he "sells or exposes or offers for sale any "article or thing in a street whether "or not he regularly carries on the "business of street trading and a "person shall be deemed to engage in "street trading in or from a stationary "position in a street if while he is "engaged in street trading he or any "article or thing exposed or offered "for sale by him or any receptacle "used by him in connection with the "street trading occupies a stationary "position in a street".

Section 29, sub-s. 1; "Every "person who . . . without the autho- "rity of a street trading licence . . . "(*a*) engages in street trading in or "from a stationary position in any "street within a borough . . . shall be "guilty of an offence . . ."

(2) *Post*, p. 338.

The defendant did not appear and was not represented.

Wingate-Saul, as amicus curiae. The word " offer " derives from *offero*, meaning primarily to bring before; or to present, or offer to show, exhibit: Smith's Latin-English Dictionary. There was here no " offering for sale " of any article. " Offering for " sale " does not mean the same thing as " offering to sell ". The phrase " offering for sale " implies that the goods must be there where the offer is made—namely, in this case, in the street. Moreover, the phrase in s. 15, sub-s. 1, " in a street " follows immediately, and is intended to govern " any article or thing ". The article offered for sale must be in the street by the express terms of that definition.

It is not said that the defendant was not in a stationary position.

Arthian Davies, K.C., in reply. The phrase " in a street " in s. 15, sub-s. 1, must govern " exposing . . . for sale ". It therefore governs also " offering for sale", and not " any article " or thing."

[BYRNE, J. Section 17, sub-s. 2, indicates that the article offered must be in the street because it stipulates the requirement of a stationary position.]

Section 17, sub-s. 2, requires only that the trader *or* the article exposed or offered for sale *or* any receptacle used by him must be stationary. It is not necessary that the article should occupy a stationary position in the street provided that the trader himself, or a receptacle used by him in connexion with the street trading, does so.

[LORD GODDARD, C.J. Do you contend that the Act covers dealings in a street in the city between business men—in Mincing Lane, for instance?]

Yes. It would cover also a sale of a packet of cigarettes by a man to his friend on the pavement; but no one would dream of prosecuting in such cases.

LORD GODDARD, C.J. This case, which arises under the London County Council (General Powers) Act, 1947, relates to the activities of street photographers, of whom the defendant is one. Many people, no doubt, regard such persons as pests and would like to see them removed from the streets. It may or may not be that there are other statutes which enable that to be done. The question that we have to decide is whether the provisions of this Act are so drafted as to enable proceedings to be taken against persons who stop one in the street, take what is generally called a " snapshot ", and then offer to send one a copy the next day.

It was submitted by counsel for the prosecution that if a photographer takes a photograph and offers to supply a copy of the photograph he is offering to sell an article or thing. It may be that that is right. We have not considered the question, sometimes raised in cases under the Sale of Goods Act, 1893, whether such a contract is one of work and labour done or sale of goods. I am assuming for the purpose of this judgment that there was, in this case, a contract for the sale and delivery of a chattel, namely, a photograph.

Mr. Davies relied on a decision of the High Court of Justiciary in Scotland, *MacIver* v. *Robertson* (3), by which the court upheld the conviction of a man for street trading under a by-law passed in pursuance of a statute in similar terms to those of the Act of 1947, in circumstances similar to those in the present case. The defendant in that case took a photograph of a person and told him that he would deliver the finished article to him at a stated address on the next day. Counsel pressed that case in aid, because he said that it showed that there was in the present case an offering for sale within the meaning of s. 15, sub-s. 1, and s. 17, sub-s. 2, of the Act of 1947.

The court is indebted to Mr. Wingate-Saul, who appears here on the instructions of the Home Office to give assistance to the court, because the defendant is not represented. Of course, it is obvious that a matter of very considerable importance is involved here—important to a number of people who, whatever may be thought of their methods of earning a living, and however desirable or undesirable it is that they should pester people in the street to have their photographs taken, are nevertheless entitled to do so unless there is an Act of Parliament which forbids them to do so.

Mr. Wingate-Saul has put certain considerations before the court as to what is the true construction of this section. He contends for a narrower construction than that for which the prosecution contend.

On full consideration of this matter I have come to the conclusion that the magistrate was right. I think, on looking at the whole scope of this Act, and the expressions used in it, that it is meant to cover only the case of a man who is actually offering for sale goods which are in the street. It is not meant to apply to a contract or agreement made by two people in the street but who are not at the time dealing in goods which are there physically present. If we read the definition of "street "trading" in s. 15, sub-s. 1, in this way: "'street trading' "means the selling or exposing or offering any article or thing "in a street for sale" the matter, I think, becomes reasonably

---

(3) *Post*, p. 338.

1950

NEWMAN
v.
LIPMAN.

Lord Goddard, C.J.

clear. I think that that is clearly what is really aimed at by the Act. It is an Act to prevent obstruction, and I think that its whole scheme shows that it is aimed at barrow-boys, costermongers, hawkers or others who expose goods in the street for sale and offer them for sale at that time. That is made more clear by looking at s. 17, sub-s. 2. It seems to me that, though that definition applies if the trader or the goods are stationary, the Act contemplates the sale of goods which are in the street, and not merely a contract entered into in the street.

Otherwise, the consequences would be very far-reaching. There are various markets in London in which a great deal of business in commodities is done in the street. I cannot believe that it is meant by this Act that if two business men are standing on the pavement and one agrees to sell to the other 100 tons of corn, or something of that sort, and they then pass on, they are committing an offence; but that would be the result if we supported the argument put forward by the prosecution. It is all very well to say that no one would think of prosecuting in such circumstances; but when there are two possible constructions to be put on an Act I think it right to prefer that which does not lead to anomalies.

It is true that we are differing from the opinion expressed by the High Court of Justiciary in Scotland. It is no doubt desirable that where an Act of Parliament applies on both sides of the border the construction placed on it by the courts in both countries should be the same. The decision in Scotland was on the construction of a by-law of Glasgow Corporation. I fully admit that we are taking a different view from that of their Lordships of the High Court of Justiciary, but we cannot help that. We have to put on this Act, which we are regarding as a whole, the construction which we think right, and in my opinion the magistrate construed the Act correctly in holding that it covered only the exposing or offering for sale of goods which were in the street, and not the making by two persons who were standing still in the street of a contract to sell goods which were not in the street.

The appeal must be dismissed.

BYRNE, J. I am of the same opinion.

ORMEROD, J. I agree.

Appeal dismissed.

Solicitors: *Allen & Son; Treasury Solicitor.*

R. P. C.

NOTE

MacIVER *v.* ROBERTSON.

1950
May 25.

Lord Justice-Clerk, Lords Jamieson and Russell.

Local government—Street trading—"Offering for sale" of article—Street photographer—Agreement to sell photograph—Glasgow Corporation Act, 1946 (9 *&* 10 *Geo.* 6, *c. lxi*), *s.* 5, *sub-s.* 1.

Case stated by the judge of Glasgow Police Court.

The defendant, Hector MacIver, was convicted at Glasgow Police Court on February 16, 1950, of being employed in street trading without having been granted a permit for that purpose by Glasgow Corporation contrary to a Glasgow by-law of 1947 made under s. 5, sub-s. 1, of the Glasgow Corporation Act, 1946. The defendant appealed from that conviction by case stated to the High Court of Justiciary.

The facts appear sufficiently from the judgment of the Lord Justice-Clerk.

May 25, 1950. The Lord Justice-Clerk. The accused was charged that he did on January 17, 1950, in Sauchiehall Street, Glasgow, engage, or was employed in street trading by taking photographs of persons walking in that street, handing them cards, and offering the photographs then taken by him for sale, without having been granted a permit for that purpose by Glasgow Corporation.

It appears from the facts as found by the judge that the defendant was on that day engaged in taking photographs of persons walking in that street, and that afterwards he handed to those persons cards on which was printed: "You have just been photographed for Movie Cards ". . . Flashlight pictures—2 for 1s. 9d. Post free. You may call and "see them tomorrow . . .", and a name and address followed. The judge found also that the photographs so taken were not actually sold in the street, but that the persons photographed could call, view and purchase them at a later date at the address mentioned on the cards. The defendant admitted in evidence that the cards which he handed to persons photographed were offers for sale which were made in the street.

By s. 5, sub-s. 1, of the Glasgow Corporation Act, 1946: "The "corporation may make by-laws for regulating the hawking selling "or offering or exposing for sale in any street of goods or articles of "any description" with certain immaterial exceptions "in this section "referred to as 'street trading'". Under that section a Glasgow by-law of 1947 provided that no person should engage or be employed in Glasgow in street trading—defined in terms similar to those of s. 5, sub-s. 1, of the Act of 1946—unless he had been granted a permit for that purpose by the corporation.

The point that we have to decide seems to me to be a narrow one. There is no doubt that at first sight one would be inclined to say that a by-law of this kind was intended to strike at the familiar type of street trading where the street trader has in his possession certain articles which he proceeds to dispose of on the spot; and it was pressed on us very strongly that the actual presence of the goods on the street was essential. But I am not prepared to give effect to that contention.

It seems to me that the definition of street trading in s. 5, sub-s. 1, of the Act, especially in its reference to offering for sale, covers the sort of transaction which took place here. There is no doubt that what the defendant was doing was to trade, or that, with a view to trading, he did, as he himself admitted, offer to sell certain goods. It seems to me that it would be taking too narrow a view to say that the fact that the ultimate product was not actually in existence until the following day when the person photographed went to the premises to get it prevented the operation from being an offer for sale. It seems to me that there is enough in the findings of fact to bring this case within the by-law and I suggest to your Lordships that the appeal be dismissed.

Lord Jamieson. I agree with my Lord that the case is a narrow one. It may be that the by-law was primarily intended to meet the more common form of street trading, namely the bringing of goods on to the street and selling them or offering or exposing them for sale there; but I am not satisfied that its meaning is so restricted. The defendant is a photographer. He was, without doubt, carrying on his trade in the street, and the sole question is whether that comes within the statutory definition of "street trading". It is true that he was not exposing the photographs for sale, because the negatives had not then been developed and thus no photographs had been made; but he was offering photographs for sale and he was making that offer in the street. I think that the by-law is sufficiently wide in its terms to cover a transaction of that sort.

Lord Russell. I am of the same opinion. Having regard to the facts found it appears to me to be shown that the defendant made a personal approach to a particular individual on each occasion when he handed a card. That personal approach was an offer to sell a particular article, an initial preparation of which had been carried out in the street (by the camera) to make the article offered something of particular interest to that particular offeree. In that situation, while I agree that the definition of "street trading" is not easy, I consider that the findings in the present case are relevant and adequate to bring the occupation in which the defendant was engaged within the category of the offering for sale in a street of an article. I therefore agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Herbert Macpherson, for W. T. Russell Fenner, Glasgow; Campbell, Smith, Mathison & Oliphant.*

R. P. C.

1950
Oct. 4.

Lord Goddard, C.J., Byrne and Ormerod, JJ.

PILBURY *v.* BRAZIER.

Road Traffic—Insurance—Permitting uninsured vehicle to be driven on road—Vehicle accidentally not restored to cover after withdrawal for repair—Underwriters' acknowledgment of liability—"Special reasons" for non-disqualification—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 35, *sub-ss.* 1, 2.

A defendant owned a fleet of taxicabs covered by an insurance policy. While one of the vehicles was under repair the insurance in respect of it was suspended. When it was taken back into service the defendant forgot to notify the insurers of that fact, with the result that it was used when technically not insured. The insurers, however, in the circumstances, would have considered themselves on risk had an accident occurred calling for indemnity under the policy, and so informed the police. The justices imposed a fine, but refused to impose a disqualification.

Held, that, while the defendant was guilty of contravening s. 35, sub-s. 1, in respect of the use of the vehicle which was in fact an uninsured use, special reasons existed to justify the justices in refraining from imposing disqualification.

CASE STATED by Essex justices.

The defendant, Ernest Walter Brazier, a taxicab proprietor, pleaded guilty to an information preferred by the prosecutor alleging that on March 15, 1950, at Upminster, he unlawfully permitted one of his drivers to use a motor vehicle on a road without there being in force in relation to its use such a policy of insurance in respect of third-party risks as complied with Pt. II of the Road Traffic Act, 1930, contrary to s. 35 of that Act.

At the hearing of the information the following facts were proved or admitted:—The defendant owned a fleet of taxicabs, including the vehicle in question, and employed a garage manager to whom he had given instructions that all the vehicles when on the road should be covered by a policy of insurance. On March 15, 1950, the driver was driving the vehicle in question and was unable to produce a certificate of insurance in respect of the vehicle when called on to do so. On March 21 the defendant produced at Upminster police station a letter dated March 21 from an insurance company, addressed to the superintendent of police at Upminster, in which they stated that the vehicle was one of those covered by a policy in the defendant's name, but that the insurance in respect of that particular vehicle had been suspended on February 15 as it was then taken off the road for overhaul, and by an oversight the company had not been informed when the vehicle was taken back into service a few days before the offence. They further wrote that the underwriters at Lloyd's, who held the risk, confirmed that, had an accident occurred giving rise to a call for indemnity under the policy, they would have considered themselves on risk; and evidence to that effect was given at the hearing.

The justices, being of the opinion that the underwriters would in fact have treated the vehicle as covered by insurance had a claim arisen, fined the defendant 10*l.*, but held that special reasons existed why they should not disqualify him for holding or obtaining a licence.

The prosecutor appealed against the refusal of the justices to disqualify.

A. M. S. Neave for the prosecutor. The mere fact that the insurers informed the court that the underwriters would have met any claim had an accident occurred does not constitute a special reason for the court to refuse to disqualify the defendant. The offence was in fact committed when the vehicle was uninsured.

I. H. Jacob for the defendant, was not called on.

LORD GODDARD, C.J. This case comes before the court on the vexed question of what is or is not a special reason for refraining from disqualifying a motorist who is driving an uninsured car. This court has constantly said in no uncertain terms that, ordinarily speaking, to drive an uninsured car is a serious offence, even if it is only driven a little way. There are very often cases in which it is found that on a technical and strict construction of the policy the underwriters would not be liable. The most familiar instance is where a man has forgotten to renew his driving licence. Technically he is not then insured, although his policy may have several months to run, as the risk attaches only if the car is being driven by a licensed driver; but that is a point which no respectable insurance company ever takes. If an approved insurance company tell the court or the police that in the circumstances of the case they would have regarded themselves as liable and would have been willing to meet any claim made it is quite obvious that the mischief which the Act was designed to prevent does not arise, and in those circumstances it cannot be said that there does not exist a special reason for the justices to refuse to disqualify; for they can be satisfied that if an accident had happened the insurers would have paid, and that therefore the mischief which the Act was designed to prevent never arose.

There was ample ground for the justices to hold that there was a special reason in this case. The only point on which I differ from them is that, in view of their finding, it was not necessary to impose a fine of 10*l.*; but no doubt it was useful in making the defendant more careful to see that due steps are

1950

Pilbury
v.
Brazier.

taken in future. It is quite impossible to say that there were not ample grounds for the justices to refrain from disqualifying, and therefore the appeal is dismissed.

Byrne, J. I entirely agree. I think it would have been extremely surprising if the justices had come to any other conclusion than that to which they did come.

Ormerod, J. I agree.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co., for Arthur Morgan, Chelmsford; G. Lebor & Co.*

S. C.

1950
Oct. 4.

Lord Goddard, C.J., Byrne and Ormerod, JJ.

BARKER *v.* LEVINSON.

Criminal law—". . . shall not as a condition of the grant . . . of a tenancy . . . require . . . any premium"—Rent collector employed by manager of block of flats—Delegated authority to let flat—Acceptance of premium as condition of granting lease—Whether within general scope of employment—No proof of manager's knowledge—Criminal liability—Landlord and Tenant (Rent Control) Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 2, *sub-s.* 1.

The manager of a block of flats employed a rent collector to whom on one occasion he gave authority to grant a lease in respect of a certain flat if the collector should consider the prospective tenant satisfactory. As a condition of granting a lease the collector demanded and received a premium of 100*l*. It was not proved that the manager knew anything of the transaction, or that he received any part of the premium.

Held, that, as there was no evidence that the illegal act of the rent collector was within the general scope of his employment, the manager was not criminally responsible for that act and so not guilty of contravening s. 2 of the Landlord and Tenant (Rent Control) Act, 1949.

Secus, if the manager had appointed the rent-collector as his agent in the management of the block of flats generally.

Case stated by Middlesex justices.

An information was preferred by the prosecutor, Bertram Barker, against Benjamin Levinson, the defendant, alleging that on October 27, 1949, by his agent Harry Purkis he required of a Mrs. Smith 100*l.* as a condition of the grant to her of the tenancy of a flat at 10, Valley Close, Pinner, contrary to s. 2 of the Landlord and Tenant (Rent Control) Act, 1949 (1).

At the hearing of the information the following facts were proved or admitted:— The flat was one of a block of flats owned by a limited company who employed the defendant as their agent with authority to undertake the care of and conduct the letting of the flats. Purkis was the defendant's agent with authority to collect rents. In October, 1949, the defendant authorized Purkis to let the flat in question to a Mrs. Smith provided that he was satisfied that she would be a suitable tenant. In pursuance of that authority Purkis let the flat to her, but, as a condition of so doing, he required of and received from her a premium of 100*l.* It was not proved to the justices' satisfaction that the defendant authorized Purkis to require or accept a premium, or that he knew that Purkis had done so, or that the defendant had himself received the premium or any part of it.

On behalf of the prosecutor it was contended that s. 2 of the Act of 1949 contained an absolute prohibition, and that in consequence a principal was criminally liable for all the acts of his agent which constituted a breach of s. 2.

It was argued on behalf of the defendant that the requirement of a premium by Purkis and his acceptance of it were not acts within the scope of his authority from the defendant either expressly or by implication, and that the defendant was therefore not criminally liable for those wrongful acts committed by Purkis without the defendant's knowledge.

The justices were of the opinion that s. 2 of the Act of 1949 imposed an absolute prohibition, and that a principal was criminally liable for the act of his agent in contravening an absolute prohibition if it were within the scope of the agent's express or implied authority; but they held that the evidence did not prove beyond reasonable doubt that Purkis' act in requiring payment of a premium was within the scope of his express or implied authority from the defendant. They accordingly dismissed the information.

The prosecutor appealed.

J. C. Lawrence for the prosecution. Section 2, sub-s. 1, of the Act of 1949, imposes an absolute prohibition, and a principal is criminally responsible for the act of his agent which contravenes such a prohibition. The agent was expressly authorized to let the flat and is in the same position as a potman who is authorized by the licensee to sell liquor but forbidden to sell it to an intoxicated person: if he sells it to such a person the licensee is criminally liable. Reliance is placed on *Griffiths* v. *Studebakers, Ld.* (2), where it was held that the owners of a car, who held a limited trade licence in respect of it, were liable to the penalty imposed by s. 12 of the Roads Act, 1920, in respect of their servant's act in contravention of the regulations, although the contravention was without their knowledge and contrary to their express orders. The purpose of the Act of 1949 is to protect the public against a principal who accepts a premium through his servant. *Collman* v. *Mills* (3) illustrates the employer's criminal responsibility for the act of his servant which contravenes an absolute prohibition.

---

(1) Landlord and Tenant (Rent Control) Act, 1949, s. 2, sub-s.1: "A person shall not as a condition "of the grant . . . of a tenancy to "which this section applies, require "the payment of any premium in "addition to the rent".

E. J. P. Cussen for the defendant. This case differs from those where the servant's prohibited act is within the scope of his employment. Here Purkis was not acting within the scope of his employment: the authority which was given to him was expressly limited to seeing whether the prospective tenant would be satisfactory and, if so, letting it to her. The legislature did not intend that the dishonesty of the servant in taking a bribe should involve his principal. In *Star Cinema (Shepherd's Bush), Ld.* v. *Baker* (4) it was held that, where a cinema attendant, in transferring persons from a cheaper to a dearer part of the house, was acting outside the scope of her employment, the proprietors were not criminally liable under the Finance (New Duties) Act, 1916, by reason that the transfer had taken place without payment of the extra entertainments duty.

Lawrence replied.

LORD GODDARD, C.J., stated the facts, read s. 2 and continued:—It was contended that, as Purkis was the defendant's servant, the defendant became liable for the criminal act which Purkis had committed; but, for anything that is found by the justices, Purkis may have put this 100*l*. in his pocket. He may have taken it simply as a bribe from Mrs. Smith, saying: "If "you like to give me 100*l*. I will tell my principal that you are "a satisfactory tenant and let you in". If a master were responsible for that state of affairs it would be a very serious matter indeed, for it would mean that no estate agent managing property could ever safely trust anything with regard to the letting of premises to one of his servants: he would have to do it himself in case his servant should take some bribe from a prospective tenant.

The principle, I think, which underlies the cases concerning the criminal responsibility of a master for the act of his servant can be thus stated: if a master chooses to delegate the conduct of his business to a servant who does an act in the course of conducting the business which is absolutely prohibited, the master is liable.

---

(2) [1924] 1 K. B. 102.
(3) [1897] 1 Q. B. 396.
(4) (1922) 86 J. P. 47.

In *Linnett* v. *Commissioner of Metropolitan Police* (5), the question was whether one co-licensee could be criminally responsible for acts connected with misconduct on licensed premises committed by his partner, who was also a co-licensee. In giving judgment I said (6): "In this case there was no relationship of "master and servant between the appellant and Baker. They "were joint licensees. If one licensee chooses to say to his co-"licensee, although not his servant: 'We are both licensees and "'both keepers of this house, but I am not going to take any "'part in the management of this house, I leave the manage-"'ment to you', he is putting his co-licensee into his own place "to exercise his own powers and duties and he must, therefore, "accept responsibility for what is done or known by his "co-licensee in that exercise. That is the principle which "underlies all the cases to which I have referred".

If the defendant here had put Purkis into the position of being a general agent in respect of these flats and had left the management to him generally, and Purkis had done an illegal act, the defendant might have been liable; but no fact is found by the justices that shows anything of that sort. He had no authority to negotiate the terms; he had no authority to take a premium; and what he did was an illegal act which his master had no means of preventing and had in no way authorized him to do either expressly or impliedly. I can find nothing in the facts found in the case to show that this was within the general scope of Purkis' authority.

In the case of *Collman* v. *Mills* (7), which has been referred to, the foreman of the respondent was left to carry on the slaughterhouse and, although he had been told that he was not to slaughter one beast in the presence of another, he did so. There he was doing that which he was left to do, namely, to slaughter beasts in the course of the business.

Therefore I think that the justices applied their minds to the right principles and came to the right decision. The appeal will be dismissed.

BYRNE, J. I entirely agree. It is quite plain that the authority which Purkis had was of a very limited character.

---

(5) [1946] K. B. 290.
(6) Ibid. 295.
(7) [1897] 1 Q. B. 396.

Therefore the case does not fall within the line of cases establishing that the principle is that the master is vicariously responsible if his servant commits an offence in the general scope of his employment. The servant in this case was not acting within the general scope of his employment.

Ormerod, J. I agree.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co., for Edward S. Saywell, Northwood; Murray, Napier & Co.*

S. C.

C. A.

1950
Oct. 4.

Somervell, Cohen and Denning, L.JJ.

MIDLAND COUNTIES MOTOR FINANCE CO. LD. *v.* SLADE.

Hire-purchase—Guarantee—Motor-car—Dealer's guarantee to finance company of hirer's payments—Provision that guarantee not to be avoided by company's giving time to hirer—Proviso that dealer be informed when instalment more than thirty days "overdue"—Extension of time for payment granted by company to hirer—When dealer to be informed—"Overdue"—Meaning.

A finance company bought a motor-car from a dealer and let it on a hire-purchase contract to a hirer who undertook to pay the company a sum forthwith, and then twelve monthly instalments of 21*l.* 12*s.*, the first payable on August 31, 1948, and the others on the last day of each succeeding month. Contemporaneously with the signing of that agreement, the dealer entered into a contract of guarantee with the company by which he guaranteed "the due and "punctual fulfilment and performance" by the hirer "of the whole "of the terms and provisions of the hire-purchase agreement". By the contract of guarantee it was provided that the guarantee should not be avoided by the company's giving time to the hirer or granting him any other indulgence; but there was a proviso to this term that the company should inform the dealer, the guarantor, when any payment or instalment should be more than thirty days "overdue". The hirer paid the company the instalments due on August 31 and September 30, but defaulted on his payment due on October 31. On November 18, 1948, the company, in consideration of the sum of 1*l.* 15*s.* paid to them by the hirer, granted an extension for the payment of the sum which had been due on October 31 until November 30. On December 28, the company gave notice to the dealer that the hirer found it impossible to meet his obligations under the hire-purchase agreement; that they had informed him that he must deliver the car to the dealer; and that the dealer owed them the balance outstanding from the hirer of 216*l.* Subsequently,

C. A.

1950

MIDLAND COUNTIES MOTOR FINANCE CO. LD. *v.* SLADE.

they sued the dealer for this amount under the contract of guarantee. The dealer, relying on the proviso to the term permitting the company to give time to the hirer, contended that the instalment due on October 31 was thirty days "overdue" on November 30, and that he was not informed of the default until December 28. Accordingly, he said, the company could not rely on the term in the contract of guarantee that the giving of time to the hirer should not have its normal effect at common law, and therefore the contract of guarantee was avoided. The company contended that, by reason of the company's agreement to give time to the hirer, the instalment originally payable on October 31 was not due until November 30 and was not therefore thirty days "overdue" when the notice of default was given on December 28, 1948.

Held, that the debt for this instalment was due on October 31 and thenceforwards. On November 18, after the company had granted the hirer an extension of time until November 30, 1948, in which to pay the instalment due on October 31, this debt was still due, though not then enforceable: it remained debitum in praesenti, solvendum in futuro. Money might be due before it becomes payable. Accordingly, on November 30, 1948, the payment of that instalment by the hirer was thirty days "overdue", and, the proviso not having been satisfied, the contract of guarantee was avoided at common law by the company's having granted the hirer an extension of time for the payment of the instalment.

Decision of Hilbery, J., reversed.

APPEAL from Hilbery, J.

The defendant was a dealer in motor-cars from whom a customer, one William John Hughes, was anxious to purchase a motor-car. The plaintiff finance company purchased the car from the dealer and entered into a hire-purchase agreement dated July 31, 1948, with Hughes as hirer, which provided that the hirer should pay to them a sum down and instalments, described as rentals, the first of which for 21*l.* 12*s.* became due on August 31, 1948, and the succeeding eleven instalments of the same amount on the last days of the succeeding months. Contemporaneously with the signing of that agreement, the defendant dealer entered into a contract with the company by which he guaranteed "the due and punctual fulfilment and "performance" by the hirer, "of the whole of the terms and "provisions of the hire-purchase agreement". The dealer further agreed that "this guarantee shall not in any way "be avoided, released or affected by reason of any breach "or breaches (wilful or otherwise) of the said agreement committed (with or without my knowledge or consent) by the "company nor by the company giving time to the hirer or "granting him any other indulgence or by the company or the "hirer making any variation in the said agreement. Provided "that no such variation shall make me liable for a greater

" maximum sum under this guarantee than that for which I " am liable as the said agreement now stands. Also provided " that the company shall inform me when any payment or " instalment shall be more than thirty days overdue. Property " not to pass from the company until paid for in full ".

The hirer paid the rentals due on August 31 and September 30, but the rental due on October 31 was never paid. It appeared from an entry in the company's books on November 18, 1948, that they, in consideration of the sum of 1*l.* 15*s.* then paid to the company by the hirer, granted him one month's extension. The parties construed this to mean that the hirer had, until November 30, to pay the rental due on October 31: it did not mean that the hirer had until December 17 to pay that rental. Somervell, L.J., agreed with that construction.

On December 28 the company wrote to the dealer stating that the hirer had written to them saying that he found it impossible to meet his obligations under the hire-purchase agreement, that they had informed him that he must deliver the car to the dealer in good condition and running order and that the total balance outstanding was 216*l.* Under the contract of guarantee by the dealer, the company had an option if the hire-purchaser defaulted, to call on the guarantor, the defendant dealer, to take over the car and pay to the company the amount outstanding.

The plaintiff company brought an action against the dealer, the defendant, on his guarantee, to recover the balance outstanding. The dealer, relying on the second proviso to the contract of guarantee that " the company shall inform me when " any payment or instalment shall be more than thirty days " overdue ", contended that the instalment due on October 31 was thirty days overdue on November 30, and that he was not informed of this until December 28. Accordingly, the company could not rely on the agreement that the giving of time to the hirer should not have its normal effect at common law and that the guarantor was therefore released.

The plaintiffs contended that the thirty days referred to in the proviso, in these circumstances operated as from November 30, when under the agreement to give time the October rental became due. It was not, therefore, " overdue " until thirty days from the time when, under the agreement as varied, it could have been paid. Hilbery, J., took that view, and gave judgment for the plaintiff company.

The defendant dealer appealed.

G. N. Black for the defendant dealer. The only issue here is whether the condition in the second proviso: " that the com- " pany shall inform me when any payment or instalment shall "be more than thirty days overdue", was applicable on these facts. If it was, the company did not give that information within the time specified and, consequently, the term allowing the company to give time to the hirer, the principal debtor, without prejudice to their rights against the guarantor was not effective. Since the company did give time to the hirer, the guarantor by the rule of the common law is released from his guarantee. The third instalment of hire was due on October 31, 1948, and, since it was never paid, remained always due and, therefore, "overdue". It is conceded that by a binding agreement between the company and the hirer, the instalment due on October 31 and thereafter always due, was from November 18 not payable until November 30, 1948. The word in the proviso, "overdue" means overdue under the original agreement between the company and the hirer. No subsequent agreement between the company and the hirer can alter the meaning of the word "overdue" in the agreement of July 3, 1948. On November 18, 1948, the instalment remained "overdue", but not presently payable.

J. F. Drabble for the plaintiff company. This instalment originally due on October 31 was not due by the express agreement made between the company and the hirer until November 30 and the company duly gave information to the guarantor that the payment was "overdue" within thirty days of that date, *i.e.*, on December 28. This proviso does not condition the permission to the finance company to give time to the hirer for payment of the instalments. The proviso is general to the whole agreement. The terms of the proviso cannot be a condition precedent and there is no ambiguity in the word "overdue" either patent or latent. In Halsbury's Laws of England (2nd ed.), Vol. 16, sub. tit. "Guarantee", at p. 59, note (e) is in these terms:—"Money can be said to be due in a legal sense, "when it can be recovered by action, and it is impossible to say "that anything is due, when no money can be recovered by any "legal process; *In re Moss; Ex parte Hallet* (1), *per* Darling, J., "approved by the Court of Appeal: see *In re British Salicylates* "*Ld.* (2)". The question whether at any time money is due is determined by the answer to the question, whether, then, there is an actionable claim.

G. N. Black in reply. In certain contexts, money may be due before it becomes actually payable. Debitum in præsenti, solvendum in futuro. See the observations of Scrutton, L.J., in *McKenna* v. *City Life Assurance Co.* (3). If the contention for the company were correct, under their contract, the company could continue, from month to month to give time to the hirer, the principal debtor, without knowledge of it by the guarantor and so without the opportunity to the guarantor to exercise any remedy he might have or to exercise pressure against the procrastinating hirer.

---

(1) [1905] 2 K. B. 307.
(2) [1919] 2 Ch. 155, 159.
(3) [1919] 2 K. B. 491, 496.

SOMERVELL, L.J. The plaintiff company's contention was that the thirty days referred to in the second proviso, operated, in the circumstances which arose here, as from November 30, 1948, when, under the agreement to give time, the October instalment had become due. It was not, therefore, " overdue " until thirty days from the time when, under the agreement as varied, it could have been paid. Mr. Drabble, who appeared for the plaintiff company, pointed out that having regard to the agreement to give time, nothing was due and, therefore, a fortiori nothing was " overdue " on November 30, 1948. That is the view which commended itself to the judge at the trial. He thought that there was an inconsistency between the earlier provisions of the second part of the guarantee allowing the company to give time to the hirer, without prejudice to their rights against the guarantor, and the provision that they should give him notice as contended for by the defendant, the guarantor. I think myself that there are arguments which require serious consideration on each side. It is one of those cases in which parties have used words which are not easy to apply to the circumstances which have arisen. Mr. Drabble rightly emphasizes the word " overdue ": " when any payment or instalment " shall be more than thirty days overdue ". An instalment, he submits, cannot be overdue when the parties have agreed that, although it became due in the past, it shall be, as a right, not claimable or due until a future date.

I have come to a different conclusion from that of the judge. I think that the clue to the construction of these words is to be found in the fact that they are in a second proviso to the clause whereby the giving of time is not to avoid the guarantee. Omitting certain words, I will read the latter part of the agreement to bring out what seems to me to be the structure of it: The guarantor agrees that this guarantee shall not be affected by the company's giving time to the hirer or granting him any other indulgence, " Provided that no such variation shall make " me liable for a greater maximum sum under this guarantee " than that for which I am liable as the said agreement now " stands. Also provided that the company shall inform me when " any payment or instalment shall be more than thirty days " overdue ". It seems to me that that provision, appearing as a second proviso, must be construed as either limiting or conditioning the agreement which has gone before as to the giving of time or other indulgence. It does not seem to me that real effect is given to its place in the agreement on the construction put forward by Mr. Drabble. On that construction, time could be given and extended without the knowledge of the guarantor: he would only know if thirty days had elapsed without payment beyond the extended time. That is a construction which seems to me to be unnatural having regard to the position of these words as a second proviso, and also one that does not commend itself to me.

What happened here tends to confirm the uselessness of the proviso on that construction to the guarantor: if the hire-purchaser, having obtained consent to postponement of the payment of a monthly instalment, does not produce the money when that further time has elapsed, and neither obtains an agreement for further time nor pays for thirty days, I should have thought that, as in fact happened here, the company would say: "This "cannot go on. Either produce the money or we will exercise "our rights under the hire-purchase agreement".

On the other hand, the construction put forward by the defendant, the guarantor, seems to me the natural construction, having regard to the place of the relevant words in the agreement, and also I think is what one would expect. It is in substance a proviso to this effect: "You can enlarge the time, "but if you enlarge it for a period longer than thirty days beyond "the original date in the original agreement, then you must let "me know". I think that that is what a guarantor might well require to know. After the grant to the creditor in very wide words of a power to give time or other indulgence, I would expect a provision: "If you extend the time for payment by more than "a certain period, inform me, the guarantor: I may have rights, "or I may have persuasive powers, or I may be able to get "things on a more satisfactory basis; but I cannot allow you to "go on extending time indefinitely without my being informed". I think that the words are plainly capable of that meaning. As was pointed out by my brother Cohen in the course of the argument, one of the words used in the proviso is "instalment"—"any payment or instalment". The word "instalment" is not actually used in the hire-purchase agreement, but it plainly refers to the August, September and monthly rentals; and I think that the August rental would be overdue for thirty days on September 30 even though, in the meantime, an arrangement had been come to for the giving of time.

As was said in the course of the argument, this is not a matter which is susceptible of great elaboration. The arguments on both sides require serious consideration, but, for the reasons which I have given, I have come to the conclusion that the trial judge was wrong. That being so, it is plain that the claim cannot succeed.

A second point was referred to by the judge at the trial. He said: "The other point which emerged, though it was not "pleaded, was whether, having regard to what had occurred, the "hire-purchase company could do otherwise than claim the "difference between the present value of the car, which was "their property, and the total sum which the hirer would have "paid for it, if he had performed his contract, it being pointed "out to me that under the terms of the hire-purchase agreement "the company has power, where instalments are unpaid, to "terminate the hire-purchase agreement, and to retake possession of the car; but there is no provision that the whole amount "becomes thereupon due". I agree with what the judge said about that point on the basis, of course, of the construction that he put upon the contract; but, in the view which I take it does not arise, and it is therefore unnecessary for me to discuss it.

I will ask my brother Denning to give the second judgment.

DENNING, L.J. It often happens that when a man gives a guarantee he gets nothing out of it for himself. Not so here: this guarantee was given by a seller who was very much interested in seeing that the sale went through, so as to get his own profit. But that does not affect the situation. Hire-purchase finance companies have gained great benefits through the courts' holding that these hire-purchase documents operate according to the letter, and they must take them with the corresponding disadvantages. This company bought this car and paid for it; and if they are now to make the dealer liable it is only upon his guarantee of the performance by the hirer of the hire-purchase agreement; and they must take that guarantee subject to all the rules of law applicable to it.

The dealer, the defendant, guaranteed the due and punctual payment by the hirer of the instalments of 21*l*. 12*s*. 0*d*. a month. But subsequently the company made a binding agreement to give time to the hirer. All we know about it is that the instalment due on October 31, was unpaid; but there was an entry in their books on November 18, 1948, whereby, in consideration of the sum of 1*l*. 15*s*. 0*d*. then paid by the hirer, they granted him one month's extension. That is plain evidence of a binding agreement to give time, and prima facie the guarantor would be released by reason of it.

How do the company avoid that result? They say that there was an express term of the agreement of guarantee, whereby they were allowed to give time and that the guarantee was not to be avoided by the giving of time. I agree; but that was subject to a proviso that the company should inform the guarantor when any payment or instalment was more than thirty days " overdue ". Was this proviso fulfilled? In my judgment, this debt became due and payable on October 31, 1948, and it was overdue from that date onwards. By the agreement of November 18, 1948, the company agreed that they would not exercise their remedies if the instalments were paid a month in arrear, but that did not affect the existence of the debt, nor the date when it became due: it was simply an agreement to give time. The effect of it was that the debt remained due, but not enforceable. Between November 18 and 30, it was debitum in præsenti, solvendum in futuro. At the end of November, 1948, it was thirty days overdue, and in order to satisfy the proviso, the company ought within a reasonable time thereafter to have told the guarantor that it was " overdue ". But they did not tell him so for another twenty-eight days. The proviso was therefore not fulfilled, and the company have not performed the condition under which alone they could avoid the common-law release. Moreover, it seems to me that the proviso means that the company must inform the guarantor when any instalment under the original agreement, as originally made, is more than thirty days overdue: whereas the company's argument involves the proposition that the company need only give the information in respect of an instalment under that agreement " as varied by any subsequent agreement ". The words are not clear enough to warrant such an unlikely interpretation.

In my opinion, therefore, the condition contained in the proviso was not fulfilled and the company cannot avoid the result of their binding agreement to give time. The guarantor is therefore released.

COHEN, L.J. I am of the same opinion. I confess that I have changed my mind more than once in the course of the argument, but I am now satisfied that the appeal should succeed. The observation of Scrutton, L.J., in *McKenna* v. *City Life Assurance Co.* (4), to which Mr. Black called our attention, seems to me to show that the expressions " due " and " overdue " are expressions each capable of two meanings, and that in a certain context money may be due before it becomes payable. That being so, we have to consider what " overdue " means in the second proviso. That proviso is intended to qualify the relaxation by the guarantor of his rights and to afford him some protection. If we accept Mr. Black's contention that an instalment of rent is overdue if it is not paid on the date originally fixed, even though the

---

(4) [1919] 2 K. B. 491, 496.

C. A.

1950

MIDLAND COUNTIES MOTOR FINANCE CO. LD. *v.* SLADE.

Cohen, L.J.

creditor extends the time for payment, the proviso will ensure that no extension will be made for more than thirty days without the guarantor being informed of that fact; whereas, if we accept Mr. Drabble's construction, the company can extend the time indefinitely without any communication with the guarantor, who may well think that the instalments are being regularly paid. It is true that the guarantor may not be able to establish any claim at law as a result of receiving the information that an instalment is overdue; but the receipt of the information may well enable him to prevent undue procrastination. I therefore prefer Mr. Black's construction, which seems to me to give business efficacy to the document, to that of Mr. Drabble, which I think would render the protection, purported to be given by the second proviso, practically illusory.

I would add that, if I were still in doubt, the maxim that an instrument should be construed contra proferentem would lead me to the same conclusion. For these reasons I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *J. R. Phillips & Co., London and Bradford; Barlow, Lyde & Gilbert, for Swann, Dodson & Co., Sheffield.*

C. G. M.

C. A.

1950
Oct. 5, 6.

Somervell and Denning, L.JJ.

ADAMS *v.* SUNDAY PICTORIAL NEWSPAPERS (1920) LD. AND CHAMPION.

[1950 A. 144.]

Defamation—Alleged libel—Defence of fair comment—Plaintiff's reply of "express malice"—Interrogatories as to defendant's sources of information or grounds of belief—R. S. C., Ord. 31, *r.* 1A.

In an action claiming damages for libel, the defendants pleaded fair comment made bona fide on a matter of public interest, making use of what is commonly called the "rolled-up" plea. By his reply, the plaintiff pleaded that the words complained of were printed and published with express malice.

He applied for leave to administer to the defendants the following four interrogatories:—

"(a) Before you published the words complained of, or caused "them to be published, had the plaintiff to your knowledge sent "any letter or letters to any and what anti-British newspaper or "newspapers and/or politician or politicians in the United States "of America? If yea, identify the said letter or letters.

"(b) Before you published the words complained of, or caused "them to be published, did you know of any and what anti-British "newspaper or newspapers, politician or politicians having on any "and what date or dates in any and what way or ways used any and "what utterances of the plaintiff for propaganda against Marshall "Aid?

"(c) Before you published the words complained of, or caused "them to be published, had the plaintiff to your knowledge used on "any and what date or dates in any and what way or ways the "plight of the unemployed for an attack on Britain?

"(d) What steps and/or precautions did you take and what "inquiries did you make before publishing the words complained "of, or causing them to be published, to ascertain whether the "expressions of opinion contained therein were founded on facts?"

By R. S. C., Ord. 31, r. 1A: "In an action for libel or slander "where the defendant pleads that the words or matters complained "of are fair comment on a matter of public interest or were published on a privileged occasion, no interrogatories as to the "defendant's sources of information or grounds of belief shall be "allowed".

The plaintiff contended that this new rule did not prohibit the administering of these interrogatories, since the plaintiff sought to ascertain by them the actual information and knowledge of the defendants—not the sources of their information, and, the actual belief of the defendants—not the grounds of their belief; and that the answers to the interrogatories would be vital to his case on the issue of express malice and to disposing fairly of the cause or matter.

Held, that in each case the administering of the interrogatory was prohibited by the terms of the new rule—R. S. C., Ord. 31, r. 1A.

APPEAL from Parker, J., in chambers.

The plaintiff, by his statement of claim, stated that he was at all material times the honorary secretary of the Bolton Unemployed Workers' Committee and that the first-named defendants, Sunday Pictorial Newspapers (1920) Ld., falsely and maliciously printed and published and the second-named defendant, Ralph Champion, falsely and maliciously wrote and caused to be printed and published of the plaintiff and of him in the way of his office the following words:—

"A LITTLE MAN WHO DOES A GREAT DEAL OF HARM"

"By RALPH CHAMPION"

"His name is William Adams, and he claims to be the spokes"man of the unemployed in Bolton, Lancashire's prosperous "cotton and engineering town. He is not very important there, "and I would not bother you with his activities if he confined "them to Lancashire. But Mr. Adams boasts that he sends "many letters to anti-British newspapers and politicians in the "United States, 'exposing the plight of the unemployed', and "says that they use his outpourings for propaganda against

"Marshall Aid. I saw a sample of his writings when he sent a "letter to the Pictorial. In it he accused Britain of being "'hypocritical' in demanding increased production from "workers, and said that the Ministry of Labour had done "nothing to procure work for several hundred Bolton unemployed. William Adams is small, dark, and suffers from a "chest complaint. He was discharged from the R.A.M.C. in "1943 on medical grounds and since then, he says, he has done "less than twelve months' work, usually as a temporary night "watchman.

"*Helping the Other Chaps.*—But he told me: 'I get a "'disability pension. So I am not so worried about finding a job "'for myself. My main concern is to help other chaps'. 'The "'other chaps' are the 800 members of Bolton Unemployed "Workers' Committee, of which he is hon. secretary. Only half "these men are out of work. The remaining 400 are numbered "among Bolton's 93,000 employed workers. Make no mistake. "If it were true, as Mr. Adams suggests, that hundreds of "capable men are unable to find jobs in Bolton, then he would "be fully justified in the accusations he makes. But what are "the facts? The manager of Bolton Labour Exchange, Mr. "Barrett, declared when I saw him: 'If two dozen fit men who "'wanted to work walked into this office now, I could find them "'jobs immediately'. Who are these people, then, whom Mr. "Adams so vociferously represents? Most of them are good, "honest people who would very much like to achieve the dignity "of a regular job at a regular wage. But they have one common "disadvantage from an employer's point of view: They are not "physically fit. I went with Mr. Adams through case-papers "of many of his members, and later I met some of the men. "Only one was 100 per cent. physically fit. All the others had "some disability—either poor eyesight, weak hearts, paralysed "arms, chest complaints or a variety of neuroses. And hardly "a soul among them had not taken at least temporary jobs in "recent months.

"Adams agreed with me that these unfortunates would be "unsuitable for heavy work. But he could see nothing wrong "in using their plight for his damaging attack on Britain. "Adams also claims that local employers are ignoring the provisions of the Disabled Persons (Employment) Act, which "makes it compulsory for big firms to employ a quota of three "per cent. disabled, and that the local council engages fit men "to do jobs the unfit could do. On this point, the labour "exchange says: 'The employers here are playing the game to "'the full, and the council employs more than its quota'.

"Well, there is the evidence. What is the verdict? Bolton's "disabled will be better served by their own political parties to "the trade unions and the genuine social workers than by a man "like William Adams, who boasts that he helps the enemies of "Britain—and so often misrepresents his facts".

The plaintiff pleaded that by these words the defendants meant and were understood to mean that the plaintiff was an unpatriotic man who deliberately misrepresented to anti-British newspapers and politicians in the United States of America the number and plight of unemployed persons in Great Britain, well knowing that he might thereby cause Marshall Aid to cease or to diminish and that this would bring about widespread distress and increase unemployment in this country, and that the plaintiff was therefore utterly unfit to continue in his office or to associate with right-thinking people.

By their defence, the defendants admitted that they printed and published the words of the alleged libel; but they did not admit that the words complained of meant or were understood to mean what was set out in the innuendo. They stated that the words complained of were true in substance and effect, and, alternatively, so far as these words were statements of fact, they were true in substance and in fact, and in so far as they consisted of expressions of opinion they were fair comments made bona fide and without malice upon the facts, which were matters of public interest. By his reply the plaintiff pleaded that the words complained of were printed and published with express malice.

The plaintiff applied for leave to administer eight interrogatories of which the first five were as follows:—

1. Before you published the words complained of, or caused them to be published, had the plaintiff to your knowledge sent any letter or letters to any and what anti-British newspaper or newspapers and/or politician or politicians in the United States of America? If yea, identify the said letter or letters.

2. Before you published the words complained of, or caused them to be published, did you know of any and what anti-British newspaper or newspapers, politician or politicians having on any and what date or dates in any and what way or ways used any and what utterances of the plaintiff for propaganda against Marshall Aid?

3. Before you published the words complained of, or caused them to be published, had the plaintiff to your knowledge used on any and what date or dates in any and what way or ways the plight of the unemployed for an attack on Britain?

4. When you published the words complained of or caused them to be published did you believe that the said words were true?

5. What steps and/or precautions did you take and what inquiries did you make before publishing the words complained of, or causing them to be published, to ascertain whether the expressions of opinion contained therein were founded on facts?

Master Horridge and, on appeal, Parker, J., disallowed interrogatories Nos. 1, 2, 3 and 5, but leave was given to administer interrogatory No. 4. Leave to appeal having been granted by the Court of Appeal, the plaintiff appealed.

Cartwright Sharp, K.C., and *Travers* for the plaintiff. The four interrogatories which have been disallowed would have been allowed before the advent of the new rule (1), R. S. C., Ord. 31, r. 1A: *Elliott* v. *Garrett* (2); and *Plymouth Mutual Co-operative and Industrial Society, Ld.* v. *Traders Publishing Association, Ld.* (3).

[SOMERVELL, L.J. The first two interrogatories, having regard to the nature of the words in the article—" Mr. Adams boasts " —might have been disallowed without reference to the new rule.]

The pleading in the innuendo " an unpatriotic man who " deliberately misrepresented ", should have prevented that. The precedents for these interrogatories will be found in Gatley on Libel and Slander (3rd ed.), at p. 845. There has been no decision yet reported on the effect of R. S. C., Ord. 31, r. 1A. And the only question is whether the new rule affects these interrogatories in this case. The plaintiff interrogated the defendants on their actual information and knowledge—not on their sources of information or grounds of belief. Expressio unius est exclusio alterius. In the case of each of the first three interrogatories the vital word was " know " or " knowledge ". Just as interrogatory No. 4, which was allowed, inquired as to actual belief, so the first three interrogatories inquired as to the actual information of the defendants. The fifth interrogatory goes to the belief of the defendants in the truth of the information. These interrogatories are relevant on the issue of express malice which the plaintiff pleaded by his reply. If the answers to them had been " No ", they would have been vital to the plaintiff's case, to disposing fairly of the cause or matter, and for saving costs: see R. S. C., Ord. 31, r. 2.

Milmo for the defendants was not called on.

SOMERVELL, L.J. It is admitted that if any one of these four interrogatories fell within the scope of R. S. C., Ord. 31, r. 1A, it would be rightly disallowed. In my view, having regard to the nature of the words used in the article, the judge would have been entitled to have disallowed interrogatories Nos. 1 and 2 without reference to the new rule. Counsel's answer to that was based on the innuendo pleaded, which put a special meaning on the words complained of. Whether by such an innuendo you can extend the scope of discovery is a matter which does not fall to be decided at the moment. On that view, I think both interrogatories fall within Ord. 31, r. 1A, since, in reality, they are interrogatories with regard to the defendant's sources of information.

---

(1) By R. S. C., Ord. 31, r. 1A (S.I. 1949, No. 761 (L.7)): " In an " action for libel or slander where " the defendant pleads that the words " or matters complained of are fair " comment on a matter of public " interest or were published on a " privileged occasion, no interroga- " tories as to the defendant's sources " of information or grounds of belief " shall be allowed ".

(2) [1902] 1 K. B. 870.

(3) [1906] 1 K. B. 403.

Again, with regard to interrogatory No. 3 I think that the judge could have disallowed that on ordinary principles, but, assuming that it was admissible on the alleged libel and on these pleadings apart from the new rule, then I think that it falls within the new rule. That interrogatory seems to me to be based on this view of the article, that the writer is saying that the plaintiff used the plight of the unemployed for an attack on Britain, and the interrogatory seems to be plainly asking the defendants for either the sources of their information or the grounds of their belief.

Interrogatory No. 5 also is prohibited by the rule. To answer it properly the defendants must state what steps they took. Suppose that the author had written letters asking questions: he would have to set out the persons to whom he had written and all the questions which he had asked, and it would fall within the territory of what the rule says: a defendant must not be interrogated upon the sources of his information.

Counsel for the plaintiff pointed out that the issue of express malice was raised here by the reply. If a defendant answered "No: I did not take any steps", that would or might assist the plaintiff in showing malice; but that is of no assistance to the court in deciding whether the interrogatory comes within the class of interrogatory prohibited by the rule, since that would still be so in the case of an interrogatory which is undoubtedly within the scope of the rule. If the interrogatory were: "what were your sources of information?" and the answer were: "I had none", that answer would assist the plaintiff; but such an interrogatory, it is plain, is prohibited by the rule.

DENNING, L.J. I agree. At one time it was common practice for interrogatories to be allowed in the form set out in Gatley on Libel (3rd ed.), at pp. 845, 846. Those interrogatories used to be allowed, when there was a defence of fair comment, in order to establish malice, but they never did any good; at any rate, in the course of some years' experience I never found them of any use. They were simply a nuisance and ran up costs.

The truth is that the burden on the defendant who pleads

C. A.

1950

ADAMS v. SUNDAY PICTORIAL NEWSPAPERS (1920) LD. AND CHAMPION.

Denning, L.J.

fair comment is already heavy enough. If he proves that the facts were true and that the comments, objectively considered, were fair, that is, if they were fair when considered without regard to the state of mind of the writer, I should not have thought that the plaintiff had much to complain about; nevertheless it has been held that the plaintiff can still succeed if he can prove that the comments, subjectively considered, were unfair because the writer was actuated by malice. As to this, I would say that if the plaintiff has any evidence for alleging malice, all well and good, let him call the evidence at the trial; but if he has no evidence, or insufficient evidence, I do not see why the court should assist him by allowing him to cross-examine the writer about it before the trial; for that is what these interrogatories amount to. The new rule clearly means that interrogatories such as these are no longer to be allowed; and disallowed they must be.

It was said, quite rightly, that the rule does not in express terms disallow interrogatories as to belief, and for that reason the master and the judge did allow interrogatory No. 4 as to whether the defendant believed that the words were true. But I doubt very much whether such an interrogatory helps at all. It might properly be disallowed because Ord. 31, r. 2, says: "Leave shall be given as to such only of the interrogatories as "shall be considered necessary either for disposing fairly of the "cause or matter or for saving costs". It seems to me that since the new rule, all these common-form interrogatories are gone. This appeal is, in effect, an attempt to re-establish them. I agree that it should be dismissed.

Appeal dismissed.

Solicitors: *Robinson and Bradley; Godden, Holme & Co.*

C. G. M.

C. A.

1950
Oct. 6.

Somervell, Cohen and Denning, L.JJ.

CUNNINGHAM-HOWIE *v.* F. W. DIMBLEBY & SONS LD. AND ANOTHER.

Defamation—Procedure—Alleged libel—Fair comment on a matter of public interest pleaded—No rolled-up plea—Particulars ordered stating all the facts on which comment based.

On a plea by the defendant to an action for libel that the words complained of were fair comment made in good faith on a matter of public interest, no use being made of the "rolled-up" plea, the plaintiff is not confined to obtaining particulars of the matter or matters of public interest. Unless the defendant sets out the facts on which the comments alleged to be fair are based, he may, and normally should, be ordered to give particulars of those facts.

Observations of Scrutton, L.J., in *Aga Khan* v. *Times Publishing Co. Ld.* [1924] 1 K. B. 675, 682, followed.

APPEAL from Parker, J., in chambers.

In an action claiming damages for libel the defendants pleaded, inter alia, by their defence that the words complained of were a fair comment made in good faith on matters of public interest, viz.: the selection of a Conservative candidate for the county council by-election in Twickenham East and the background and prospects of the person or persons likely to be candidates for the chairmanship and other offices of the Twickenham Conservative Association at the annual general meeting held on April 27, 1950, and were printed and published by the first defendants and caused to be printed and published by the second defendant bona fide and, without malice, towards the plaintiff.

On the application of the plaintiff, Master Horridge refused to order that the defendants should deliver within fourteen days further and better particulars of the allegation in the defence that the words complained of were fair comments, stating all the facts and matters and identifying the documents (if any) upon which the said comments were based. The plaintiff appealed, and Parker, J., allowed the appeal ordering the defendants to give the said particulars, but granted leave to the defendants to appeal.

The defendants appealed.

Hawser for the defendants. The defence pleaded followed the precedent in Bullen and Leake's Precedents of Pleadings (10th ed.), at p. 770, being a "defence that the words were a "fair and bona fide comment in a public newspaper upon a "matter of public interest, and were published without malice". The new rule, R. S. C., Ord. 19, r. 22A (1), applies to "the "rolled-up plea", or a plea to the like effect, only. No doubt, the defendants have to give particulars of the matters of public interest on which they comment, and this has been done. But there appears to be no authority laying down that in the absence of the rolled-up or a like plea, the defendant is bound to give,

(1) By R. S. C., Ord. 19, r. 22A (see S.I. 1949 No. 761 (L. 7)): "Where in an action for libel or "slander the defendant alleges that, "in so far as the words complained "of consist of statements of fact, "they are true in substance and in "fact, and in so far as they consist "of expressions of opinion, they are "fair comment on a matter of public "interest, or pleads to the like effect, "he shall give particulars stating "which of the words complained of "he alleges are statements of fact "and of the facts and matters "which he relies on in support of the "allegation that the words are true".

C. A.

1950

CUNNINGHAM-HOWIE
v.
F. W. DIMBLEBY & SONS LD.

" all the facts and matters upon which the said comments were " based ". The object of r. 22A is, in the case of the rolled-up plea, to distinguish which of the words complained of the defendant alleges are statements of fact. In Fraser on Libel and Slander (Law and Practice) (7th ed.), at p. 264, there is this statement: " if the plea of fair comment is drawn on the old " form " (as here: see Fraser's precedent No. 29, para. 6, at p. 314), " or as in the rolled-up form, but without the averment " that the comments are based upon the said facts ", particulars must be given of the matters of public interest upon which the comment is based, and presumably not of " the said facts " which are not pleaded. It is clear from the decision in *The Aga Khan* v. *Times Publishing Co.* (2) that there are the same issues of fact and of law in the case of the general plea as in that of the rolled-up plea. The rule therefore is and remains that these particulars will not be ordered: there is an exception in the case of the rolled-up plea, by virtue of R. S. C., Ord. 19, r. 22A; but the general rule remains the same.

Milmo for the plaintiff. The rolled-up plea was used to evade these particulars, but this device has been negatived by the new rule, R. S. C., Ord. 19, r. 22A, after the protests of many judges, including those of Atkin, L.J., and of Scrutton, L.J.—of the latter in the *Aga Khan* case (2) and of the former in *Hobbs* v. *" The People " Publishing Co. Ld.* (3). See also the views of the court (Greer, Slesser and Scott, L.JJ.) in *Tudor-Hart* v. *British Union for the Abolition of Vivisection* (4).

As to the case where fair comment, made in good faith on a matter of public interest, is pleaded not by the rolled-up plea, the statement in Gatley on Libel and Slander (3rd ed.) under the heading of " Plea of Fair Comment " is: " the defence of fair " comment must always be specially pleaded. If the defendant " relies on any facts outside those stated in the alleged libel as " the basis for his comment, he should plead: ' the said words " ' are a fair and bona fide comment on a matter of public " ' interest ', and give particulars of the facts on which he relies. " But if his comment is based solely on facts stated in the " alleged libel he should say so in his plea ". The plaintiff here is asking quite generally on what the defendant bases his comment. The practice, before the new rule was passed, was that in such a case such particulars should be ordered. Scrutton, L.J., said in *The Aga Khan* v. *Times Publishing Co.* (5): " Then the " defence of fair comment would be pleaded in another para- " graph " (to the plea of justification), " and unless it set out " the facts upon which the comments alleged to be fair were

---

(2) [1924] 1 K. B. 675.
(3) The Times, March 30, 1926.
(4) [1938] 2 K. B. 329, 336–7.
(5) [1924] 1 K. B. 682.

" based, the defendant might be ordered to give particulars of " those facts ".

Hawser replied.

SOMERVELL, L.J. I will ask Denning, L.J., to give the judgment of the court.

DENNING, L.J. For many years before 1949 it was the practice of the Bar to plead the "rolled-up plea" of fair comment, because it gave the benefit to the pleader that he would not be ordered to give particulars of the facts on which he relied. That benefit was conferred by the case of *The Aga Khan* v. *Times Publishing Co.* (6) and other cases; but several judges, including Atkin and Scrutton, L.JJ., expressed their strong disapproval of it; and in 1949 the rule was altered. By the new rule, R. S. C., Ord. 19, r. 22A, it was laid down that particulars can, and should, be ordered, in respect of the rolled-up plea, of the facts which are alleged to be statements of fact and of the facts and matters relied on in support of the allegation that the words are true. That new rule does away with an anomaly of the law.

This case is really an attempt to bring that anomaly back again. It is said that if the pleader does not plead the rolled-up plea, but only pleads the general plea of fair comment, the plaintiff is not entitled to particulars of the facts on which the comment is based. Let us just see what the plea of fair comment entails:—An essential part of it, and the proper preamble to it, is for the defendant to allege that the facts on which he comments are true. If that is expressly alleged, the plaintiff is clearly entitled to particulars of the facts. But even if it is not expressly alleged, it is still implicit in the plea; and, if the plaintiff is to know the case he has to meet, he must be given particulars of the facts which are relied upon in support of the plea. Take the instance which I put in the course of argument (taken from a similar illustration given by Atkin, L.J., in *Hobbs* v. "*The People*" *Publishing Co. Ld.* (7), quoted in *Tudor-Hart* v. *British Union for the Abolition of Vivisection* (8)), suppose that it were said of a man that "he is a thief and there- " fore unfit to be a councillor"; then, if the rolled-up plea were pleaded, in the old days the plaintiff could not get any particulars of the charge that he was a thief. As Atkin, L.J., said in *Hobbs'* case (7), that was a monstrous state of affairs; and it has been rectified by the new rule 22A of Ord. 19.

Suppose now in such a case that the general plea is put in,

---

(6) [1924] 1 K. B. 675.

(7) The Times, March 30, 1926.

(8) [1938] 2 K. B. 329, 336.

C. A.
1950
Cunningham-Howie
v.
F. W. Dimbleby & Sons Ld.
Denning, L.J.

"The said words are fair comment made in good faith on a "matter of public interest": surely particulars should be given. That was the practice before the new rule. Indeed, in the *Aga Khan* case (9), Scrutton, L.J., expressly stated (10) in reference to the general plea that "unless it", the plea of fair comment, "set out the facts upon which the comments alleged to be fair "were based, the defendant might be ordered to give particulars "of those facts". That practice should, I think, be retained, and no new anomaly introduced. It is not sufficient for the pleader to specify merely the matter of public interest. That would be done, in the illustration which I have given, by simply saying that it was the plaintiff's fitness to be a councillor. The defendant must go further and give particulars of the facts on which the comments are based; that is, of the facts which go to the pith and substance of the matter. The defendant must know what they are, because he intends to prove them at the trial, and it is no hardship for him to give particulars of them. In these circumstances, I think that this appeal should be dismissed.

Somervell, L.J. I agree.

Cohen, L.J. I also agree.

Appeal dismissed.

Solicitors: *Calvert-Smith & Sutcliffe; Cozens & Moxon, Hampton, Middlesex.*

C. G. M.

(9) [1924] 1 K. B. 675. (10) Ibid. 682.

1950
Oct. 6.
Lord Goddard, C.J., Byrne and Ormerod, JJ.

HOLT *v.* DYSON.

Road Traffic—Dangerous driving—Notice of intended prosecution—Despatch by registered post to permanent address of defendant—Defendant in hospital to knowledge of police—Notice not received in fourteen days—Duty of police to act reasonably—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 21 (*c*).

A notice of intended prosecution under s. 21 (*c*) of the Road Traffic Act, 1930, was sent by the police on the eleventh day after the date of the alleged commission of an offence, by registered post, addressed to the proposed defendant at her permanent home address. She did not receive the notice within the statutory fourteen days of the commission of the offence because she was in hospital suffering from injuries received in the accident giving rise to the intended prosecution. The police at the time of the posting knew that the proposed defendant was then in hospital and that she was not likely to be discharged for a considerable time.

Held, that the defendant's late receipt of the notice constituted a failure by the police to comply with s. 21 (*c*), since they must act reasonably in such matters but had failed to do so, it being entirely their fault that the notice was not received within the statutory period.

Stanley v. *Thomas* [1939] 2 K. B. 462, distinguished.

CASE STATED by Hove justices.

An information was preferred against the defendant, Joy Mary Dyson, charging her with unlawfully driving a motor-car in a manner dangerous to the public contrary to s. 11, sub-s. 1, of the Road Traffic Act, 1930.

On the hearing of the information the following facts were proved or admitted:— On November 17, 1949, at 4.30 p.m., a road accident occurred on the Old Shoreham Road, Hove. The defendant received severe head and other injuries as a result of the accident and was taken from her vehicle in an unconscious state and removed to the Hove General Hospital.

A police constable visited the defendant in hospital three times. When he visited her first, on November 17, she was still unconscious. On the second visit, on November 20, she was conscious but still confused and could not remember the route that she had taken before the accident. On the last visit, on November 24, she remembered that route, and the police constable then informed her that she would be reported for the question of a prosecution to be considered for careless driving or dangerous driving.

On November 28, 1949, a notice signed by the Superintendent of Police, Hove, was sent by registered post addressed to the defendant at her permanent address at Mill Road, Worthing, giving notice that it was intended to prosecute her for dangerous and careless driving.

The defendant was detained in the Hove General Hospital until January 23, 1950, as a result of the injuries that she had received in the accident, and the police made no inquiries after November 24 and before sending the notice to ascertain whether she was in fact still in hospital. On December 9, 1949, the registered envelope containing the notice was returned to the police and the notice was then served personally on the defendant in the hospital.

It was contended for the defendant that the sending of the notice to her home address was not sufficient compliance with

1950

HOLT v. DYSON.

s. 21 (*c*) of the Road Traffic Act, 1930 (1), because it was sent to a place at which to the knowledge of the police she was not and was not likely to be.

The prosecution relied on *Stanley* v. *Thomas* (2).

The justices were of opinion that a notice of intended prosecution under s. 21 (*c*) of the Act of 1930 must be either served personally or sent by registered post to the place where the addressee actually was or was reasonably believed by the addressor to be; that in the present case the police knew that the defendant was in the hospital on November 24 and that it was within their knowledge that she was not likely to be discharged for a considerable time; and that s. 21 had not been complied with. The justices accordingly dismissed the information.

The prosecutor appealed.

Harold Brown for the prosecutor. This case is covered by *Stanley* v. *Thomas* (2). It is a compliance with s. 21 (*c*) of the Road Traffic Act, 1930, to send the notice to the home address of the defendant. Otherwise the police cannot know where they stand. They must have a simple rule on which they can rely in such matters.

Friend for the defendant. *Stanley* v. *Thomas* (2) is distinguishable. There the notice was posted soon after the accident at a time when it might have been expected in the ordinary course to reach the defendant within the statutory fourteen days. Here it was sent to an address where, as the police knew, the defendant was not likely to be within that period. The notice was not in fact " sent by registered post to " her at all within the meaning of s. 21 (*c*).

Brown replied.

LORD GODDARD, C.J. The justices were of the opinion that the police knew that the defendant was in hospital on November 24, 1949, and that it was within their knowledge that she was not likely to be discharged from hospital for some considerable time. Though the justices only stated that as their opinion and did not expressly find it as a fact, no other finding was open to them. That being so, why the police did not either send the notice by hand or post it to the hospital I am at a loss to understand. It would be the ordinary, reasonable, and sensible thing to do. In spite of that they sent it to an address to which, as they must have known, the defendant would not be going back for some time.

---

(1) Road Traffic Act, 1930, s. 21: " Where a person is prosecuted for " an offence . . . relating . . . to " . . . dangerous driving . . . he " shall not be convicted unless either " —(*a*) he was warned at the time " the offence was committed that the " question of prosecuting him . . . " would be taken into consideration; " or (*b*) within fourteen days of the " commission of the offence a summons for the offence was served on " him; or (*c*) within the said fourteen days a notice of the intended " prosecution specifying the nature of " the alleged offence and the time and " place where it is alleged to have " been committed was served on or " sent by registered post to him " . . .".

(2) [1939] 2 K. B. 462.

It is said that this point has been decided by *Stanley* v. *Thomas* (3). But the facts there were different from those here. In that case, it is true, when the police superintendent sent the notice he knew that the defendant was still in hospital; but it is obvious that the court there considered that, there being still nine days to go, it was reasonable for him to believe that the defendant would be back home before the statutory fourteen days expired, so that the defendant would receive the notice within the proper time.

This is an entirely different case, for here the notice was not served till three days before the fourteen days were due to expire and when the defendant was lying in hospital obviously still seriously ill. Counsel for the defendant was perfectly justified in distinguishing *Stanley* v. *Thomas* (3) on those grounds.

The consequences of acceding to the contention of the prosecution in this case would seem to be remarkable. It would mean that wherever an accident took place, whatever the circumstances were, the police could safely send the notice to the defendant's home address. Thus, if the person involved lived in Cornwall and happened to be staying in Northumberland for a month, and on the second day of his stay there met with an accident, the police, on the prosecutor's argument, though aware that the defendant was staying in Northumberland, could properly send the notice to Cornwall two days before the statutory period was due to expire.

The police must act reasonably in these matters. Section 21 (*c*) of the Road Traffic Act, 1930, provides that the notice may be sent by registered post to the defendant. If the police know where he is they can send it to him at that address. In this case the police did know where the defendant was and did not send it to her there. It was entirely their fault that the notice was not received in the fourteen days. The appeal is dismissed.

BYRNE, J. I think that it is a significant fact that, when the registered envelope containing the statutory notice was returned to the police station on December 9 because there was

---

(3) [1939] 2 K. B. 462.

1950

HOLT v. DYSON.

Byrne, J.

no one to receive it at the defendant's address, it was at once served personally on the defendant at the hospital. That indicates to my mind that the police knew perfectly well where the defendant was at all material times.

It is to be observed that in *Stanley* v. *Thomas* (4), Lord Hewart, C.J., said (5) that other considerations might apply where the circumstances were of a different kind. The circumstances in this case are entirely different from those in *Stanley* v. *Thomas* (4), and I agree that this appeal should be dismissed.

ORMEROD, J. I agree.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co. for John E. Stevens, Hove; Burton, Yeates & Hart for Malcolm, Wilson & Cobby, Worthing.*

R. P. C.

(4) [1939]2 K. B. 462. (5) Ibid., 467.

C. A.

1950 *Oct.* 10.

Somervell, Cohen and Denning, L.JJ

PARKINSON *v.* BARCLAYS BANK LD.

[1948. P. 2584.]

Landlord and tenant—Construction—Lease for twenty-one years determinable by lessors at end of fourteen years—"If they shall require "the premises for the purposes of the business carried on by them" —Part only required at then undetermined time during next seven years.

A banking company let to a dental surgeon the upper floor of premises, on the lower floor of which they carried on business, by a lease for twenty-one years. The bank were empowered by cl. 6 of the lease to determine the tenancy on certain conditions at the expiration of the first fourteen years of the term, "but notwith-"standing . . . the lessors shall only be at liberty to determine "the said term hereby created at the expiration of the first fourteen "years thereof, if they shall require the premises hereby demised "for the purposes of the business carried on by them". The bank gave notice, in accordance with the lease, determining the term of twenty-one years at the end of the first fourteen years of the lease.

In an action brought against them by the dental surgeon claiming that the bank had no right then to determine the term, the bank proved that they wanted and needed a part of the premises for the purpose of the business carried on by them, not at the end of the first fourteen years of the term, but at some time, not precisely defined, within the period of the next seven years.

Held, that the natural meaning of the conditions in cl. 6 of the lease was that, if the bank required the premises at some time during the period referred to in the condition, the last seven years of the lease, they could determine the lease at the end of the fourteen years, since that was the only way in which they could obtain possession of the premises at the time they were required, and the bank need not establish that they would require the whole of the premises at that time. The maxim contra proferentem did not come into operation unless the words to be construed were of doubtful import. Where of two constructions one gave business efficacy to the documents being construed, that should be preferred.

Per Somervell, L.J. If the provision in the lease had been that the bank could give notice to determine the term at any time during the whole of the twenty-one years if they required the premises for the purposes of their business, there would be force in the contention that the bank must require possession of the premises for the purposes of their business at the time when the notice expired, and such, in that case, would be the prima facie meaning of the condition.

Decision of Sellers, J., affirmed.

APPEAL from Sellers, J.

On March 28, 1934, the defendants, Barclays Bank, Ld., let to the plaintiff, a dental surgeon, premises on the upper floor of No. 355 Station Road, Harrow, at an annual rent of 200*l.* for twenty-one years. In the lower part of the building the bank carried on their business. By cl. 6 of the lease the tenant on certain conditions could determine the lease by six months' notice on the expiration of the first fourteen years. The clause continued: "If the lessors shall be desirous of determining this "present lease at the expiration of the first fourteen years of the "term, hereby granted", they shall be entitled to do so on certain terms, "but notwithstanding anything hereinbefore con-"tained the lessors shall only be at liberty to determine the said "term hereby created at the expiration of the first fourteen years "thereof, if they shall require the premises hereby demised for "the purposes of the business carried on by them".

On May 27, 1947, the bank served notice on the tenant determining the tenancy on March 25, 1948. The bank made it clear to the tenant that they did not want the premises or any part of them at once, and they offered him a lease subject to a six months' notice on the basis that they wanted the premises some time within the seven years. The tenant refused their offer, obtained premises elsewhere, and moved there. The bank let the premises to others for a five-year period, terminable on six months' notice. The tenant brought this action claiming that the bank had no right to terminate the lease at the end of the fourteen years since they did not then require the premises for

C. A.
1950

PARKINSON
v.
BARCLAYS
BANK LD.

the purposes of the business carried on by them within the meaning of the lease.

Sellers, J., gave judgment for the bank, holding that there was no breach of the clause, and finding that the bank intended to use the premises within a reasonable time and long before the tenancy would have expired. He also held that, though the bank required only a part and not the whole of the premises, that was sufficient to fulfil the requirements of cl. 6. The tenant appealed.

Beney, K.C., and *Gilbert Dare* for the tenant. The question at issue is the construction of the words in cl. 6 of the lease: "The lessors shall only be at liberty to determine the said term, "hereby created, at the expiration of the first fourteen years "thereof, if they shall require the premises hereby demised for "the . . . business carried on by them", i.e., for the purposes of the bank. Sellers, J., found that the bank required the premises for those purposes not at the end of the fourteen years, but at some undetermined time during the last seven years of the lease. That finding does not justify the notice to determine the lease. Verba chartarum fortius accipiuntur contra proferentem (Co. Litt. 36a), that is as between the maker of an instrument and the holder. If the words of the instrument are of doubtful import, that construction shall be placed upon terms which is most favourable to the holders: see the judgment of Lord Romilly, M.R., in *Johnson* v. *Edgware, Highgate and London Railway Co.* (1).

The time in the lease when the bank shall require the premises for the purposes of their business is at the expiration of the first fourteen years. The bank did not then require the premises for the purposes of their business. There having been a surrender of the premises, the plaintiff can still sue for damages: *Gray* v. *Owen* (2). The crucial word on this question of construction is "require". And that word, apart from its meaning of "ask" or "demand", means "to need" or "to want" for some purpose, here, the purpose of the banking business. It is not suggested that the bank required the premises for re-letting. They were wanted merely to fill in the gap of time before they required the premises, perhaps, some five years later. These premises were not "required" by the bank at the end of the first fourteen years of the lease. Compare the words in s. 5, sub-s. 3 (*b*), of the Landlord and Tenant Act, 1927: "If the land"lord proves (1.) that the premises are required for occupation "by himself" and in sub-s. 4: "where the landlord proves to "the satisfaction of the tribunal that the premises, though not

---

(1) (1866) 35 Beav. 480, 485; 35 L. J. (Ch.) 322.

(2) [1910] 1 K. B. 623.

" required immediately on any such ground as aforesaid, will be " so required after the lapse of a certain period ". In such a case the use of the future tense is demanded: " will be so required ". These words show clearly what is meant by the word " require ". The trial judge gave an unduly wide interpretation to the word " require " in cl. 6 of the lease which should be construed " contra proferentem ". I do not now " require " a coffin: my relatives will require one for me some day. The word " require " used in this lease cannot mean " I expect to require these premises at some time within the next seven years ", but " shall " require them at the expiration of the fourteen years ". As to cases on this sort of question, see *Russell* v. *Coggins* (3): " to " deliver possession if the premises should be wanted for building "; *Wilson* (*Lady*) v. *Abel* (4): " if the lessor should be " desirous during the term to take all or any part of the land " for building ". So also *Southend-on-Sea Estates Co. Ld.* v. *Inland Revenue Commissioners* (5) (see the judgment of Cozens-Hardy, M.R. (6), and of Phillimore, L.J. (7)); and *Cunliffe* v. *Goodman* (8). With regard to the judgments in the last-mentioned case, here there never was " a decision " on the part of the bank to use these premises for the purposes of their business.

The second point is that it appears from the evidence that the bank failed to establish that they required or would require the whole of the premises for the purposes of their business within the next seven years. The words of cl. 6 in the lease are " require the premises ". Elsewhere in the lease in more than one clause are the words " the premises or any part thereof ". The presumption, therefore, is that this provision of cl. 6 does not come into effect until the bank require the whole of the premises for the purposes of their business. If they had required one room of the premises, at the end of the fourteen years, which they did not, that would not have been sufficient to establish the defendant's case. And they did not expect to require the whole of the premises within the period of the next seven years. Two cases may be considered. In *Grove* v. *Portal* (9), where there was a covenant in a lease of an exclusive right of fishing, that the lessee would not procure the said premises to be assigned over to any person whatever, without certain consent, Joyce, J., held that, since the covenant did not apply expressly to any part of the premises as well as to the whole, the lessee was not precluded by the covenant from granting a licence to another person (limited to two rods) to fish in the river during the residue of

(3) (1802) 8 Ves. 34.
(4) (1814) 2 M. & S. 541.
(5) [1914] 1 K. B. 515.
(6) Ibid. 521.
(7) Ibid. 527.
(8) [1950] 2 K. B. 237.
(9) [1902] 1 Ch. 727.

the term. See also *Thompson* v. *Rolls* (10) and the judgment of Rowlatt, J., in that case (11). It has never yet been said that the lesser includes the greater. Here the bank expected to require a part of these premises at some undetermined time within the next seven years. There was never a *decision* (see *Cunliffe* v. *Goodman* (12)) by the bank to use even a part of the premises within the next seven years. And the bank had no right to serve this notice on the plaintiff to deliver up possession of the premises at the expiration of the first fourteen years of the lease.

H. Heathcote-Williams, K.C., and *Rodger Winn* for the bank, were not called on to argue.

SOMERVELL, L.J. [after stating the facts:—] After the service of the notice to quit, the bank offered the plaintiff a lease subject to a six-monthly notice on the basis that they would want the premises some time within the seven years. There was a discussion whether he could let them have one room, because they thought that, if they could have one room, that might satisfy them for a considerable time. The plaintiff, having regard to the uncertainties of the lease, even with six months' notice, obtained other premises and moved there. In the present proceedings he claims that, on the facts proved and found by the judge, the bank had no right to terminate the lease at the end of fourteen years, because they did not require the premises demised for the purpose of the business carried on by them within the meaning of cl. 6 of the lease. The plaintiff claims damages, which I think are approximately the cost incurred by having to move into other premises and adapt them.

The contention of Mr. Beney and Mr. Dare on behalf of the plaintiff on the first point is that in order to come within the words of cl. 6 the premises must be required for occupation for the purposes of the business on the date when the notice expired, that is, at the end of the fourteen years. No doubt there would be some elasticity, but Mr. Beney submitted that, to come within the words, the bank must show that they had made arrangements for occupying some or all of the rooms for the purposes of their business as soon as that period expired. He went on to submit that what they had succeeded in establishing here, which admittedly falls short of that, did not justify the judge's finding. The findings of fact of the judge are not in any way directly challenged, and I think that they are sufficient for my purpose. The judge said that a certain witness for the bank whose evidence was accepted had said "that no definite date could

---

(10) [1926] 2 K. B. 426.

(11) Ibid. 432–3.

(12) [1950] 2 K. B. 237.

"be given as to the occupation . . . but he did say that sooner "or later the bank would have to go in, the plaintiff might be "able to stay there perhaps as long as two or three years, but "sooner or later the bank would have to go in". Then the judge referred to the fact that there was a question of mechanizing the operations of the bank. That would involve getting machines from America, and, at the date when the notice was drawn up, May 27, 1947, there was a difficulty, and I dare say there still is, about that. It could not be said when such machines would be available, if at all. Then there was a reference to an additional counter clerk, and the judge summed the matter up thus, and this summary must be taken subject to the findings to which I have referred: "On the evidence I find that it has been established that the bank did require the premises at the time of "the notice to quit in order that they could use them during the "remaining period of the lease. If no notice had been given the "bank could not have used them for seven years, and I am "satisfied the bank intended and still intend to use them within "a reasonable time, and long before the tenancy would have "expired".

We were referred to certain cases, but I have not found that they assist me in construing this document. I think that in some documents words with reference to requiring premises for a certain purpose may have the meaning for which Mr. Beney contends. I would say myself that that would be the prima facie meaning if the provision could be operated at any time. If, for example, here, the lease had provided that the bank could give notice at any time during the whole of the twenty-one years if they required the premises for their business, there would be great force in saying "Well, that means require them for occupation at the moment". There would be no justification for claiming to give notice in 1950 when they were not wanted until 1951. But we have to construe these words in their context. The preceding words give the lessor a right to determine the lease, as the lessee also has the right, at the end of fourteen years. He has a right to take back to himself what he has granted at the end of fourteen years, subject to a limitation that that right shall be only exercised if he requires the premises for the purposes of the business carried on by him.

In my view the natural meaning of those words is: if the landlord requires the premises for the purpose of the business carried on by him during the period referred to in the condition, that is, during the last seven years for which he will otherwise be deprived of possession of his property. That, I think, is the natural meaning in this context. The lessors are saying: "We "let you have these premises for fourteen years, because we do "not foresee wanting them over that period, but with regard to "the other seven years if we want them over that period then "we reserve the right to give notice". It would, I think, be rather absurd if the construction were that the bank had no right to terminate at the end of the fourteen years although it might be quite clear that they would want the premises for their own purposes in a year or so but could not say that they wanted to occupy them forthwith.

Suppose the position to be that the mechanized machines were clearly going to be available within eighteen months. Mr. Beney's first argument was that the bank would have no power to exercise their right of terminating the lease because they could not say when they actually wanted to move into the rooms. On this point I agree with the judge.

The second point taken was that, on the evidence, the bank did not establish that they would require all the rooms, and I think that is so. But I do not think that the evidence shows that they only required one room. The evidence is that, in their efforts to meet the plaintiff, they said, "if we can have one room "that might satisfy us for a great deal of the period, and we "will do our best to delay our wanting the other rooms as long "as possible". I accept (and I think the judge did too) that the evidence fell short of proving that they intended to use all the rooms within the seven years. The argument is that the clause did not say, "if we require the premises or any part "thereof", whereas in other clauses of the lease there is an express reference to part. For instance, "entering upon the "demised premises or any part thereof"; and there is a reference to the destruction by fire of the premises "or any part "thereof". It is said that, that being so, this clause cannot be operated until the defendants require the whole of these premises for the purposes of their business. I do not take that view. It is a very short point and it does not admit of much elaboration.

The judge said: "It seems to me that if the bank genuinely "and bona fide require part of the premises, that is quite "sufficient to fulfil the requirements of this clause, because they "could not of course use any part of the premises, unless a notice "was given. I think that is all that is contemplated in this "particular part of the lease". That seems to me the natural construction of the words as they appear in this lease.

I think that the judge was right on both points, and that the appeal should be dismissed.

COHEN, L.J. I am of the same opinion. On the second point I do not desire to add anything to what my Lord has said.

Indeed I agree so entirely with the conclusion which the trial judge reached, and the reasons given for it, that it is only out of respect for the argument forcibly put forward by Mr. Beney and Mr. Dare that I say just a few words on the first point, namely, the question whether or not the bank can be said in the circumstances to require the premises for the purposes of the business carried on by them. Both Mr. Beney and Mr. Dare pressed us with the maxim that a deed must be construed contra proferentem. But if, applying the ordinary principles of construction, we arrive at a clear conclusion as to what the parties meant by the language which they used, I do not think that the maxim comes into action. One principle of construction is that if of two constructions one gives business efficacy to a document, while the other leads to an improbable conclusion, the court must prefer the former. I think that this is essentially a case where that principle applies, and I think that the judge arrived at the right conclusion.

Suppose that at a meeting held on May 26, 1947, the day before the notice to quit was served, the board of the bank had to consider whether or not they required the premises comprised in the demise for the purpose of the business carried on by them and so were justified in giving the notice. I think that a board of business men could on the facts found by the judge only answer that question in the affirmative. On the facts set out in the correspondence, and on the evidence, it seems quite plain that they must have thought that they would require the premises, or rather part of them, for the purpose of the mechanization, quite apart from any question of expansion of the business. It seems to me that in those circumstances it would be taking a very narrow view of the clause to say that they did not require the premises for the purpose of the business carried on by them because, having regard to the delivery date of the machine and so on, they could not fix the exact date at which the occupation might become a practical proposition. It is quite clear, I think, that the bank's witness contemplated that it would become a practical proposition at some time within the seven-year period. I do not think that the fact that they have not yet occupied the premises and have granted a tenancy of them to someone else for a five-year period terminable on six months' notice really has anything to do with the matter. I think that anybody considering the matter from a business point of view could only conclude that the premises were required for the purposes of the business carried on by them on March 25, 1948, notwithstanding that they could not actually fix the date on which they could enter into immediate occupation.

C. A.
1950

PARKINSON
v.
BARCLAYS
BANK LD.

Cohen, L.J.

For these reasons, as well as for those given by my Lord and the trial judge, I think that the appeal fails and should be dismissed.

DENNING, L.J. I agree.

Appeal dismissed.

Solicitors: *Kimbers, Williams & Co.; Baddeley, Wardlaw & Co.*

C. G. M.

1950
Nov. 13.

Parker, J.

PROTHEROE AND ANOTHER *v.* THE RAILWAY EXECUTIVE.

[1950 P. 184.]

Railways—Contract—Season ticket holder—Injury while about to enter train—Defective condition of platform near train—Duty of Executive to ensure reasonable safety of premises.

The plaintiff, a season ticket holder on a railway system owned and controlled by the Railway Executive, was on a platform waiting for a train. On the arrival of the train, he had taken two or three steps towards the carriage which he desired to enter when his foot and ankle turned over on a crack between two paving-stones near the edge of the platform, and he was injured. He sued the executive for damages, alleging that they were under a contractual duty to him as the holder of a season ticket to see that the premises to be used by him as a passenger were as safe as reasonable care and skill could make them.

Held, that, in respect of that part of the premises which was near the edge of the platform and over which, therefore, a passenger had to step in order to mount a train, there was an implied warranty that the premises were reasonably safe; that the crack between the paving-stones, in the position in which it was, constituted a danger which prevented the premises from being reasonably safe; and that the plaintiff was consequently entitled to damages.

ACTION.

A. W. Protheroe, the first plaintiff, a detective inspector in the service of the second plaintiffs, London Corporation, was the holder of a season ticket between Plaistow and the Mansion House on a railway line owned and controlled by the Railway Executive. On July 21, 1950, at about 8.50 a.m., the plaintiff was waiting for a train at Plaistow station. On the arrival of the train he turned towards the left and, after taking two or three steps towards the carriage which he wished to enter, his right foot went into a crack between two flagstones near the edge of the platform, with the result that his foot and ankle turned over and he sustained injuries which incapacitated him from work until October 24, 1950. He claimed damages for personal injuries on the ground that under the Railway Executive's contract with him as a season-ticket holder they were under a duty or implied obligation to ensure that the platform used by him was as safe for passengers as reasonable care and skill could make it, and that they had failed in that duty. In the alternative he alleged that he was an invitee of the executive and that they were accordingly under a duty to warn him of any unusual defects or dangers in the surface of the platform of which they knew or ought to have known, and that they had committed a breach of this duty.

London Corporation claimed to recover the sum which they had paid to the first plaintiff in respect of pay and allowances during his period of incapacity for work.

Sir Shirley Worthington-Evans for the plaintiffs.
T. Southall for the Railway Executive.

The arguments are sufficiently indicated in the judgment.

PARKER, J., stated the facts and continued: The first question is whether the defendants have failed to perform any contractual duty to the plaintiff as the holder of a season ticket from Plaistow to Mansion House. What the conditions of that ticket were I do not know, and I have little doubt that they are quite immaterial to this action; otherwise I should have been referred to them. It is said on the first plaintiff's behalf that by reason of the contract contained in the ticket there was a duty on the defendants as expressed in *Maclenan* v. *Segar* (1), where it was held that in the case of an innkeeper and his guest, by reason of the contractual relationship between them, there was an implied warranty that the premises were, for the purpose of personal use of the guest, as safe as reasonable care and skill on the part of anyone could make them.

In the alternative, it is said that, if the duty is not as high as that, it is at any rate as high as that which du Parcq, L.J., sitting as an additional judge of the King's Bench Division, found in *Gillmore* v. *London County Council* (2). There the plaintiff, who had paid a fee to the London County Council to participate in certain physical training classes, had slipped on the polished

(1) [1917] 2 K. B. 325.

(2) (1938) 159 L. T. 615.

floor of the hall, where these classes were taking place, and injured his left foot. Du Parcq, L.J., said (3): "It is doubtful "whether it is possible to apply to a case of this kind, the rule "which has been stressed by counsel and which is associated "with *Maclenan* v. *Segar* (4). The proper way to put it is this. "If any person or body of persons invites a man for reward to "take part in physical training and invites him to come for that "purpose to premises which he or it has hired or of which for the "time being he or it is in possession, then that person or body "of persons impliedly warrants that he or it has taken reasonable "care to see that the premises are in all respects reasonably safe "for the purpose".

On the question of the contractual position Mr. Southall argued, with considerable force, that the only contract between the parties here must be the contract of carriage from Plaistow to Mansion House and back, and that any implied warranty could only extend to the actual period when the carriage is taking place; and he points out, what I have no doubt is correct, that in all, or nearly all, of the reported cases concerned with the duty of railway undertakers in such circumstances as the present the plaintiff's claim is laid in tort and not in contract. Mr. Southall also argued that the implied warranty in *Maclenan* v. *Segar* (4) does not extend to the premises to which a passenger has access for the purpose of beginning the carriage.

I think that that is too narrow a view. It seems to me that there must be a contractual duty in relation to the premises which the passenger is bound to use for the purpose of access to the train or for dismounting from the train; and, although access to the premises may be said to be ancillary to the actual contract of carriage, I think that in relation to those premises—certainly in relation to that part of those premises which is near the edge of the platform and over which a passenger has to step to mount the train—there is an implied warranty as to the premises being reasonably safe.

I think that the proper test here is that laid down, not in *Maclenan* v. *Segar* (4), but by du Parcq, L.J., in *Gillmore* v. *London County Council* (3), to which I have referred. I think that the proper direction which I should give myself is to ask whether the defendants have taken reasonable care to see that this particular part of the platform was in all respects reasonably safe for the purpose; and I should also go on to direct myself that, in considering what is reasonable, perfection must not be required and that it must not be expected that the platform shall be absolutely perfect throughout. And finally, as

(3) 159 L. T. 615, 616.

(4) [1917] 2 K. B. 325.

du Parcq, L.J., said, I should not consider it to be conclusive, as showing that the platform was reasonably safe, that it had been used by hundreds and thousands of passengers without injury to anybody.

Was that part of the platform in this particular position reasonably safe? In considering that, it is important to bear in mind that it is near the platform's edge, and therefore in a position in which people frequently have to move quickly, are jostled by others, may be in a hurry and may have no opportunity of looking where they are going. I think that a different standard is required for such a part of the platform than, say, in the case of the paving adjoining a highway, where people can see where they are going and where their attention is not all the time being focussed on something else.

The stones in the present case, or the cracks between the stones, have not been repaired for fifteen years, and it seems to me that, in the position in which they were situated, they were a danger to people who were endeavouring quickly, among a number of other passengers, to find their way on to the train. It may be that the chances of somebody's suffering any damage by the crack were fairly remote, but it does seem to me that anybody using the platform at such a point is entitled to have a perfectly flat surface, or a reasonably flat or even surface, on which to find his way on to and off the train.

No doubt if I am right this kind of duty may put a heavy burden on to the Railway Executive, and I have throughout deliberately sought to limit that duty to the close proximity of the platform's edge without considering any question of the paving in passages leading to a platform or the like, or even the back part of a platform. But, in the position in which this crack was, I think that it was a danger and that the premises clearly were not reasonably safe in all the circumstances.

That being so, it really becomes unnecessary for me to consider the alternative way in which the case was put, namely, on the principle in *Indermaur* v. *Dames* (5). I think it sufficient to say that on that aspect of the case I think the plaintiff would be in very considerable difficulty. Without deciding the matter, I find it, at any rate at first sight, difficult to believe that there was any breach of duty on the part of the defendants within the principle of *Indermaur* v. *Dames* (5), as qualified in *Horton* v. *London Graving Dock Company* (6). In the result I give judgment for the first plaintiff for 350*l*. general damages and 23*l*. 19*s*. 0*d*. special damages. So far as the second plaintiffs

---

(5) (1867) L. R. 1 C. P. 274; 2 C. P. 311.

(6) [1950] 2 K. B. 421.

1950

PROTHEROE v. THE RAILWAY EXECUTIVE.

are concerned, it follows that they are entitled to recover, and there will be judgment for them for 119*l*. 19*s*. 0*d*.

Judgment for the plaintiffs.

Solicitors: *Comptroller and City Solicitor; M. H. B. Gilmour.*

P. B. D.

1950 *July* 18.

Lord Goddard, C.J., Hilbery and Byrne, JJ.

DROVER AND ANOTHER *v.* RUGMAN.

Children and Young Persons—Juvenile court—Girl under seventeen years sent to approved school—Appeal to quarter sessions—Girl then over seventeen years—Jurisdiction—Children and Young Persons Act, 1933 (23 & 24 *Geo*. 5, *c*. 12), *ss*. 61, 62—*Summary Jurisdiction* (*Appeals*) *Act*, 1933 (23 & 24 *Geo*. 5, *c*. 38), *s*. 1.

The principle that an appeal to quarter sessions is an appeal by way of a rehearing is a principle of procedure only, as there is no formal record of proceedings before petty sessions. Quarter sessions, on the appeal, are in the same position as were petty sessions when making the order under appeal, and the rehearing takes place in the same circumstances as did the original hearing.

Where, therefore, a juvenile court, acting under s. 62, sub-s. 1, of the Children and Young Persons Act, 1933, made an order that a certain " young person " (defined in s. 107, sub-s. 1, as " a person " who has attained the age of fourteen years and is under the age of " seventeen years "), be sent to an approved school for two years, and, by the time the appeal against that order came on for hearing before quarter sessions, she had reached the age of seventeen years,

Held, that, as the order of the juvenile court had been properly made in respect of jurisdiction when it was made, and having regard, in particular, to the terms of the amended s. 31, sub-s. 1 (vii), of the Summary Jurisdiction Act, 1879, contained in s. 1, sub-s. 1, of the Summary Jurisdiction (Appeals) Act, 1933, quarter sessions had jurisdiction to entertain the appeal from the juvenile court on its merits and, if so minded, to confirm it.

CASE STATED by Hampshire Quarter Sessions.

At a juvenile court sitting at Ryde, Isle of Wight, on October 13, 1949, an application for an order was made by Francis Rugman, an inspector of the police for the borough, under s. 61 of the Children and Young Persons Act, 1933, on the allegation that Marlene Drover was a young person who, having a parent not exercising proper care and guardianship, was exposed to moral danger and in need of care and protection. The juvenile court ordered that the girl be sent to an approved school, and that her father, Godfrey Louis Drover, should contribute 23*s.* a week towards her maintenance. Father and daughter appealed to quarter sessions, the appeal being heard by way of rehearing on November 22, 1949.

On the hearing of the appeal it was admitted on behalf of the inspector that the girl attained the age of seventeen years on November 4, 1949. It was contended for the father and daughter (1.) that the appeal was by way of rehearing, and that accordingly all material facts had to be proved before quarter sessions; that one of the facts which the inspector had to prove was that the girl was a "young person"; and that the appeal must therefore be allowed because the inspector could not prove his case; (2.) that, where a person's age was relevant for the purposes of founding jurisdiction or for the purpose of enabling a court to make a particular order against that person, that age fell to be determined as at the date of hearing, or, alternatively, as at the date of the order; (3.) that quarter sessions had not jurisdiction to make any order with regard to the girl other than an order allowing her appeal and directing her release from detention because the jurisdiction conferred on them by ss. 61 and 62 of the Children and Young Persons Act, 1933, was a jurisdiction over persons under the age of seventeen at the date of the making of the order.

It was contended on behalf of the inspector (1.) that the order remained in force until a decision had been given on the appeal either confirming, reversing or varying it; (2.) that by virtue of the Summary Jurisdiction Act, 1879, s. 31, sub-s. 1 (vii), it was further competent for quarter sessions to make such other order in the matter as they might think just and by that order to exercise any power which the juvenile court, being a court of summary jurisdiction, might have exercised; and therefore that any alteration in the status of the girl at the time of the hearing of the appeal was immaterial; (3.) that, although the appeal was by way of rehearing, that procedure only applied to the merits of the case; and (4.) that inasmuch as the girl was a young person at the time when the order was made quarter sessions could only reverse it on the ground that it was defective in law at the time when it was made, or on the merits.

Quarter sessions accepted the father's and daughter's contentions (1.) and (2.), did not consider the third contention, and allowed the appeal. The inspector now appealed to the Divisional Court.

Robert Hughes for the appellant inspector of police.

E. S. Fay for the respondents, father and daughter.

The arguments are sufficiently indicated in the contentions set out above.

LORD GODDARD, C.J. When the girl was before the juvenile court she was about sixteen years and ten months old. The court sent her to an approved school and ordered her father to contribute 23*s*. a week towards her maintenance. An order of that sort very often leads to an appeal because the last thing the parent wants to do is to have to pay for the maintenance of the child instead of having it at home. The father and daughter lodged an appeal to quarter sessions. By the time the appeals committee met, the girl had reached the age of seventeen years. As she would have to stay at the approved school until she was nineteen years old, the justices' order was a continuing order. She could not be brought before the juvenile court once she was over seventeen years old, but could be brought before it before then, whereupon the effect of the juvenile court's order was that she was to be detained in whatever place to which the court saw fit to send her till she was nineteen years old. She attained the age of seventeen years a few days before the case came before quarter sessions. Objection was taken that they could not hear it because the girl had reached the age of seventeen years, and they gave effect to that contention.

That seems to me to be completely wrong: everybody knows that an appeal to quarter sessions is an appeal by way of rehearing, but that is only a matter of procedure, there being no formal record of proceedings before justices. When a case goes to quarter sessions it is reheard; the person seeking an order proves his case over again. That only means that quarter sessions are taking the place, as it may be expressed, of petty sessions; but the proceedings are none the less an appeal; and the order here under appeal was properly made, so far as jurisdiction was concerned, at the time when it was made. The justices of quarter sessions, although they rehear a case, have to rehear it in circumstances the same as those in which petty sessions heard it.

If the matter could be made any clearer, it seems only necessary to look at the Summary Jurisdiction (Appeals) Act, 1933, s. 1 of which substitutes a new section for the old appeal section, s. 31 of the Summary Jurisdiction Act, 1879. By para. (vii) of the new s. 31, sub-s. 1: "Quarter sessions may by their "order confirm, reverse or vary the decision of the court of "summary jurisdiction, or may remit the matter with their "opinion thereon to a court of summary jurisdiction acting for "the same petty sessional division or place as the court by whom "the decision appealed against was given, or may make such "other order in the matter as they think just, and by such order "exercise any power which the court of summary jurisdiction "might have exercised; and any order made by quarter sessions "shall have the like effect and may be enforced in the like "manner as if it had been made by the court of summary "jurisdiction. . .".

The court of summary jurisdiction here had jurisdiction to entertain this application. The basic requirement was that the girl should be under seventeen years of age. She was under that age when the order was made. That order was therefore perfectly good from that point of view, whatever may have been the merits of the case, into which quarter sessions did not inquire. In my opinion, quarter sessions were quite wrong, and the case must go back to them to be heard.

HILBERY, J. I agree.

BYRNE, J. I agree.

Appeal allowed.
Case remitted.

Solicitors: *F. C. Green & Son (incorporating Crump, Sprott & Co.) for C. Merrill, Ryde; Speechly, Mumford & Craig, for Lamport, Bassitt & Hiscock, Southampton.*

L. F. J. McD.

REX *v.* LONDON QUARTER SESSIONS; *Ex parte* BOWES.

1950
Oct. 25, 27.

Lord Goddard, C.J., Morris and Parker, JJ.

Summary jurisdiction—Appeal—Metropolitan magistrate—"Sum or "penalty adjudged to be paid more than three pounds"—Right of appeal—Magistrate's order for forfeiture of goods prohibited from export—Costs exceeding three pounds awarded against claimants—Right of appeal against forfeiture order—Metropolitan Police Courts Act, 1839 (2 *&* 3 *Vict. c.* 71), *s.* 50.

By s. 50 of the Metropolitan Police Courts Act, 1839, "in every "case of summary order or conviction . . . before any" metropolitan police magistrate "in which the sum or penalty adjudged to be "paid shall be more than three pounds . . . any person who shall "think himself aggrieved by the order . . . may appeal" to quarter sessions.

An order for the forfeiture and condemnation of goods prohibited from export was made by a metropolitan police magistrate, who also ordered the claimants to the goods to pay five guineas costs. The claimants appealed to London Quarter Sessions, who allowed the appeals. On an application by the Commissioners of Customs and Excise for an order of certiorari to quash the orders of Quarter Sessions as made without jurisdiction:—

1950

REX
v.
LONDON
QUARTER
SESSIONS.
Ex parte
BOWES.

Held, that no appeal lay from the order of the magistrate forfeiting and condemning the goods and the award of costs did not give one: for a sum ordered to be paid by way of costs is not "a "sum or penalty adjudged to be paid" within the meaning of s. 50.

Reg. v. *Warwickshire Justices* (1856) 6 E. & B. 837, applied.

Cockhill v. *Davies* [1943] K. B. 508, distinguished.

Per curiam. It is not desirable, where the value of the goods is substantial and they are claimed by persons, especially if they be foreigners, against whom no proceedings are taken for an offence against the customs laws, that proceedings for condemnation should be taken before a court of summary jurisdiction with no right of appeal: they ought to be brought in the High Court.

APPLICATION for an order of certiorari.

The following statement of the facts is taken from the judgment of the court:—

The Commissioners of Customs applied for an order of certiorari for the bringing up and quashing of certain orders of London Quarter Sessions whereby they allowed appeals from a metropolitan magistrate who had made orders condemning three parcels of diamonds as forfeited under s. 177 of the Customs Consolidation Act, 1876, as applied by Part III of Sch. V to the Exchange Control Act, 1947. I. Hennig & Company, Ld., diamond brokers in this country, took to the General Post Office the parcels of diamonds in question, which parcels were all addressed to the International Bank of Tangier. The diamonds were seized at the Post Office by an officer of Customs on the ground that, being goods the export of which was forbidden, they were brought to a place for the purpose of export. Section 177 of the Customs Consolidation Act, 1876, so far as material, provides that if any goods which are prohibited to be exported shall be brought to any quay, wharf, or other place in the United Kingdom in order to be put on board any ship (which by a subsequent amendment includes an aircraft) for the purpose of being exported, all such goods shall be forfeited. Section 207 provides that whenever any seizure shall be made, unless in the possession or in the presence of the offender, master or owner, as forfeited under the Customs Acts, notice in writing of such seizure and of the grounds thereof shall be given; and the section goes on to provide that if any person gives notice that he claims or intends to claim the goods, proceedings shall be taken for the forfeiture and condemnation thereof either by information filed in the High Court or exhibited before any justice of the peace.

By s. 226 it is provided that the justice shall summon the owner of the goods to appear, and upon his appearance, due service of the summons being proved, the justice may proceed to the examination of the matter, and, on proof that the goods are liable to forfeiture under the Customs Acts, may condemn them.

The provisions above referred to create no offence, condemnation and forfeiture being decreed quite independently of any person's being convicted for any offence under the Act.

By s. 23 of the Exchange Control Act, 1947, the export of goods of any class from the United Kingdom is prohibited subject to certain exceptions, and by para. 1 of Part III of Sch. V it is provided that the enactments relating to customs shall apply in relation to anything prohibited to be imported or exported by any of the provisions of Part IV of the Act. It is further provided by para. 3 of Part III of the Schedule that, if anything prohibited to be exported by any provision of the Act is exported or brought to a quay or other place for the purpose of being exported, the exporter or his agent shall be liable to the same penalty as that to which a person is liable for an offence under s. 186 of the Customs Consolidation Act, 1876. The bringing of prohibited goods to a place for the purpose of export is thus for the first time made an offence.

Notice of the seizure was given, with the result that claims to the goods were made by the company and also by A. G. Parser, Inc., of New York, and the International Bank of Tangier, and in one case by Harry Winston, Inc., also of New York; the two New York companies claiming to be the purchasers from Hennig and Co. of the goods, and the International Bank of Tangier claiming as the consignees.

The English company were summoned as the exporters who had brought the goods to a place for the purpose of being exported, and for this offence they were convicted by the magistrate. He at the same time had before him the claims of the various claimants in the forfeiture proceedings. He found the forfeiture duly proved, adjudged the goods to be forfeited, condemned them accordingly, and awarded the commissioners five guineas costs.

The English company appealed against their conviction to quarter sessions and all the claimants appealed against the order of forfeiture and condemnation. Quarter sessions quashed the conviction of the company, and, on the appeal by the claimants against the order of forfeiture and condemnation, held that they had jurisdiction to entertain the appeal. They further held that, as they had allowed the company's appeal, it followed automatically that the orders for forfeiture fell with the conviction. They accordingly allowed the appeals.

G. D. Roberts, K.C., *Gerald Howard, K.C.*, and *W. H. Hughes* for the commissioners. Quarter sessions had no jurisdiction to entertain an appeal from the magistrate's order condemning and forfeiting the goods in question. Section 177 of the Customs

Consolidation Act, 1876, renders the goods liable to forfeiture but does not create any offence. Under the relevant sections of the Act the magistrate is empowered to adjudicate, and there is no means of challenging his decision, since none has been provided by the legislature. It is true that the legislature has given the commissioners power to mitigate the penalty and to exercise their discretion, but it has given no jurisdiction to any Court of Appeal. In the present case the magistrate was asked to impose costs on the claimants, so that they might appeal under s. 50 of the Metropolitan Police Courts Act, 1839.

It is submitted, however, that that section could not give quarter sessions jurisdiction to reverse an order for forfeiture in regard to which no right of appeal is given by the legislature. There could only be an appeal from the magistrate's order if he adjudged the payment of a " sum or penalty " of more than 3*l*., and costs are not a sum or penalty within the meaning of the section.

In *Reg.* v. *Warwickshire Justices* (1) a statute allowed an appeal where the sum adjudged to be paid on a conviction exceeded 2*l*. and it was held that the sum adjudged must exceed 2*l*., exclusive of costs, before a right of appeal existed. There have been several cases on the meaning of s. 50, in particular, *Reg.* v. *London Justices* (2), *Rex* v. *Graham-Campbell* (3), *Moseley* v. *Director of Public Prosecutions* (4), and *Mittelmann* v. *Denman* (5), but they do not appear to be of great assistance in the case before the court.

[LORD GODDARD, C.J. The short point in this case is whether, so far as s. 50 of the Act of 1839 is concerned, the words " the " sum or penalty adjudged to be paid " includes costs. The commissioners' contention is that if those words do not give a right of appeal, there is no such right.]

That is so, but it is further submitted that in any event there is no right of appeal against a forfeiture order, even accepting that the appellant might have a right of appeal against the imposition of five guineas costs, which he asked to have imposed on him. The imposition of those costs could not create a right of appeal against a forfeiture order if, in fact, such right did not exist before.

R. F. Levy, K.C., and *B. M. Goodman* for the company. The company are no longer concerned in the present issue. When they received notice of the confiscation of the diamonds, they naturally made a claim for them, but they renounced that claim in favour of the American claimant companies, and took no further part in that part of the proceedings.

(1) (1856) 6 E. & B. 837.
(2) [1900] 1 Q. B. 438.
(3) [1935] 1 K. B. 594.
(4) [1920] 1 K. B. 16.
(5) [1920] 1 K. B. 519

1950

REX
v.
LONDON
QUARTER
SESSIONS.
Ex parte
BOWES.

Sir Godfrey Russell Vick, K.C., and *T. G. Roche* for the claimants. A right of appeal existed in the present case under s. 50 of the Act of 1839. It was held in *Cockhill* v. *Davies* (6), that an adjudication by a magistrate that a recognizance should be forfeited and the sum due under it paid by the appellant was an order within the meaning of s. 50, and that an appeal lay.

[LORD GODDARD, C.J. That was an order to pay a sum of money, namely, 750*l.*]

So, in the present case there was an order for forfeiture and payment of costs, and it is quite impossible to separate one part of the order from the other.

[LORD GODDARD, C.J. Where do the claimants find their right to appeal against the forfeiture order?]

The court, having made an order, cannot split it into two parts. Here the order was that the goods were to be forfeited and the sum of costs to be paid. Any sum ordered to be paid by a court is a sum "adjudged" to be paid: see per Lord Caldecote, C.J., in *Cockhill* v. *Davies* (7). If there had been a conviction in this case there is no question but that the claimants would have a right of appeal under s. 36 of the Criminal Justices Act, 1948. There was no conviction here, but there was a condemnation; and, there being costs attached to the order of condemnation, the order cannot be separated and divided into two parts: see *Rex* v. *Recorder of Leicester* (8). Here there was a sum adjudged or ordered to be paid, and, as it exceeded 3*l.*, an appeal lay under s. 50 of the Act of 1839 against the whole of the magistrate's order.

G. D. Roberts, K.C., replied.

Cur. adv. vult.

Oct. 27. LORD GODDARD, C.J., reading the judgment of the court, stated the facts as set out above, and continued:—

This order of certiorari is sought on the ground that quarter sessions had no jurisdiction to entertain an appeal against forfeiture. It is, of course, a commonplace of the law that no appeal lies against the order of any court unless one is given by statute. It is not contended here that the Summary Jurisdiction Acts or any of the Acts extending the right of appeal to quarter sessions conferred on the claimants any right of appeal. Orders of condemnation are not convictions. The orders of condemnation do not depend on conviction; but it is contended that the claimants, having been ordered to pay five guineas costs, thereby acquired a right of appeal under s. 50 of the Metropolitan Police

---

(6) [1943] K. B. 508

(7) Ibid. 514.

(8) [1946] 1 All E. R. 615.

Courts Act, 1839, although no such right is to be found in the Customs Act or in the Summary Jurisdiction Acts in such a case.

By s. 35 of the Inland Revenue Regulation Act, 1890, which replaces s. 209 of the Act of 1876, provision is made whereby the commissioners may in their discretion mitigate any fine or penalty incurred under the Acts and compound or restore the property seized and condemned, and that seems to be the only method provided in the Customs Acts for any review of proceedings for forfeiture which may successfully be taken before justices. It is admitted that, if there had been no order for costs or if the order for costs had been for a sum not exceeding *3l.*, no appeal would lie, and the question therefore for decision is whether the words in s. 50 " in which the sum or penalty " adjudged to be paid ", includes a sum ordered to be paid for costs.

A perusal of the Act shows that it gives power to metropolitan magistrates, not only to convict for indictable and other offences, but also in certain circumstances to order sums of money to be paid; for instance, under s. 38 there is power to order compensation for wilful damage by tenants; under s. 28 power is given in the case where goods have been unlawfully pawned, pledged or exchanged to order the goods to be delivered up to the owner without compensation or with such compensation as the magistrate may think fit; and under s. 32 a magistrate may award a party informed against a sum of not more than *5l.* if the magistrate is of opinion that the information was frivolous. Then by s. 31 it is enacted that it shall be lawful for any magistrate who shall hear and determine any complaint to award such costs as to him shall seem meet to be paid to or by either of the parties to the said complaint.

There is no question here of any penalty having been adjudged, and we find it impossible to hold that the words " the " sum adjudged to be paid " were intended to apply to costs. We think that they clearly refer to cases in which the Act enables magistrates to make orders for sums of money such as those to which we have just referred. They would also, no doubt, include duties of Customs which later Acts have made recoverable summarily.

We have, however, been referred to certain cases, and reliance is more especially placed on the decision of this court in *Cockhill* v. *Davies* (9). In that case a metropolitan magistrate adjudged a recognizance to be forfeited and ordered the defendant to pay the sum of *750l.*, the amount thereof. The court held that although no appeal lay under the Summary Jurisdiction Acts, an appeal would lie under s. 50 of the Act of 1839. Lord Caldecote, C.J., in giving judgment,

(9) [1943] K. B. 508.

said there was there a summary order and that the words "summary order" were wide enough to include a direction by a magistrate that a recognizance be forfeited and the amount due under it to be paid. We cannot, however, hold that case to be an authority for the proposition that s. 50 includes an order for the payment of costs. The proceedings in that case were to obtain an order for a sum of money, namely, the amount of the recognizance, and the order of the court was that a sum of 750*l.* should be paid. No question was before the court in that case which in any way related to costs.

The case most nearly analogous to the present is *Reg.* v. *Warwickshire Justices* (10), a case under the Cruelty to Animals Act (12 & 13 Vict. c. 92). Section 14 provided that a party convicted shall pay such penalty, damage or compensation as the justice shall adjudge, order or award, together with the costs of conviction to be settled by such justice. Section 25 gives an appeal to quarter sessions in all cases where the sum adjudged to be paid on any conviction shall exceed 2*l.* The justices had convicted the applicant for the rule and fined him 2*s.* 6*d.* as a penalty and 2*l.* 7*s.* 6*d.* for costs, and it was contended that as the total amount which the defendant had to pay was accordingly 2*l.* 10*s.* 0*d.*, he had the right of appeal. The court, however, held that the sum adjudged to be paid in s. 25 related to the sum which the party was to pay by way of penalty or compensation and not to the costs, and said that they thought the meaning of the Act was that where the subject matter is of a slight nature so that the penalty or compensation is under 2*l.*, the matter is to rest where it is and is not to be removed into another court.

Crompton, J., went on to say (11): "The provision for an "appeal, in every case where there is imprisonment, is in favour "of this view. We think that the right to appeal is to depend "on the comparative gravity of the offence, and not on the "amount of the costs, which do not depend on the nature of "the offence, but vary according to the distance of the residence "of the parties, the number of witnesses", and so forth.

It is true that the court pointed out that s. 14 of itself obliged the defendant to pay the costs and said that the justice did not adjudge or award the costs but only acted as a taxing master in fixing the amount. In that respect, no doubt, the Act we are now considering differs from the one in question in that case, because under s. 31 of the Act of 1839 it is a matter for the justice to decide whether he awards costs or not, and his award of costs is therefore an adjudication. But in our opinion that is not the real ratio decidendi of the case. We think that what

---

(10) 6 E. & B. 837.

(11) Ibid. 842.

1950

Rex v. London Quarter Sessions. *Ex parte* Bowes.

underlies the judgment is that the appeal depended on the money ordered to be paid as a penalty independent of the question of costs. As the court in that case took the view that the meaning of the Act was that no appeal lay where the subject matter was so trivial that the penalty or compensation was not more than 2*l.*, so here we think it is clear that the intention of this Act is not to give an appeal where the penalty or compensation, etc., does not exceed 3*l.*

Sir Godfrey Russell Vick contended that the order is one and entire and that, as the order did require his clients to pay a sum exceeding 3*l.*, that gave them a right of appeal against the order as a whole; but, as in our opinion costs are outside the purview of the section altogether, we do not think that this contention avails him. The fact is that there is no appeal, and an award of costs does not give one. To decide otherwise would lead to the absurd result that an appeal in respect of condemnation of goods worth over 100,000*l.* would depend upon whether the magistrate gave costs to the amount of 3*l.* or more.

Another result would be that a right of appeal would be given to a person whose goods were the subject of an order of condemnation in a metropolitan police court and nowhere else. It is true that that same anomaly was noticed in *Cockhill* v. *Davies* (12), and in *Mittelmann* v. *Denman* (13), where the court said that, though there might be an anomaly, it was a matter for the legislature to correct and not the courts. At the same time, such an anomalous result should be avoided unless the court feels constrained by the words of the Act to give effect to such a result.

We cannot part with this case without expressing some regret that in a matter of such magnitude the commissioners elected to go before a court of summary jurisdiction when the proceedings might have been brought in the High Court. We would call attention to the fact that citizens of another country were concerned in this case and we cannot but suppose that it is a matter of considerable surprise and grievance to them to find that a case in which so much of their money was involved was brought before a police court, with no right of appeal, and that there was no power for them to insist upon the matter being heard by a judge of the High Court. Had proceedings been taken by way of information, the matter could certainly have gone to the Court of Appeal and, with leave, to the House of Lords. It should be borne in mind that conditions in 1876 were very different from those which prevail today, more especially since the provisions of the Customs Consolidation Act have been applied to offences and proceedings under the Exchange Control Act, 1947. It does seem to us desirable that where the goods are

(12) [1943] K. B. 508.

(13) [1920] 1 K. B. 519.

1950

Rex v. London Quarter Sessions. *Ex parte* Bowes.

claimed by persons against whom no proceedings are taken for an offence against the Customs, and more especially where those persons are foreigners, proceedings should be taken for condemnation in the High Court unless indeed the value of the goods is so low that proceedings in the High Court would not ordinarily be considered appropriate.

There will be an order of certiorari and the orders of quarter sessions brought up and quashed.

Order of certiorari without costs.

Solicitors: *Solicitor for Customs and Excise; William Easton and Sons; William Charles Crocker.*

P. B. D.

REX *v.* MURRAY.

C. C. A.

1950
Oct. 16.

Lord Goddard, C.J., Byrne and McNair, JJ.

Criminal law—Procedure—Confession—Ruling on admissibility—Right of accused person to cross-examine witnesses for prosecution in presence of jury as to method of obtaining confession.
Sentence—Corrective training—Cogency of Prison Commissioners' Report.

On the trial of an indictment for felony the only evidence against the prisoner was a confession signed by him but which he alleged was not a voluntary one since he had been induced to make it by certain promises by the police. His defence was an alibi. At the beginning of the trial the recorder, in the absence of the jury, heard evidence from the police and from the prisoner with regard to the making of the confession, and he ruled that it was admissible as having been properly obtained. Later, evidence was given and the recorder refused to allow counsel for the prisoner to cross-examine the police witnesses again in the presence of the jury as to the manner in which the confession had been obtained; and in his summing-up he told the jury that they must accept from him that the confession was a voluntary one obtained from the prisoner without duress, bribe or threat.

Held, that, since the weight and value of the confession were matters for the jury, and since, in considering those matters, they were entitled to take into account the manner in which they thought that it had been obtained, counsel for the prisoner was entitled to cross-examine the police again in the presence of the jury as to the circumstances in which the confession had been made, and to try to show that it was obtained by means of a promise or threat; that there had accordingly been a misdirection by the recorder on a point of law; and that the conviction must in consequence be quashed.

C. C. A.
1950

REX
v.
MURRAY.

Per curiam. Sentence of corrective training should not be passed if the Prison Commissioners report against its suitability.

APPEAL against conviction.

The appellant was indicted at Lincoln Assizes on one count of breaking and entering the offices of the Lincoln City Football Club and stealing from them, to which he pleaded not guilty, and on a second count of attempting to break and enter a shop with intent to commit a felony, to which he pleaded guilty. Owing to lack of time the indictment was sent to the quarter sessions for trial. The only evidence against the appellant on the first count was a confession signed by him but which he denied was obtained from him voluntarily; he alleged that he was induced to make it by a promise made by the police. At the beginning of the trial the recorder, in the absence of the jury, heard evidence from the police and the appellant with regard to the making of the confession, and ruled that it was admissible as having been properly obtained. The appellant, whose defence was an alibi, gave evidence, and his counsel sought to cross-examine the police witnesses and re-examine the appellant in the presence of the jury as to the manner in which the confession had been obtained. The recorder refused to allow this, and in summing up told the jury that they must accept from him that the appellant's confession was a voluntary one obtained from him without duress, bribe or threat. The appellant was sentenced to four years' corrective training.

J. R. T. Hooper for the appellant.

Miss J. M. Henderson, for the Crown, referred to *Bartlett* v. *Smith* (1) and *Rex* v. *Chadwick* (2); and relied on an observation of Hilbery, J., in *Rex* v. *Cowell* (3), where, in answer to counsel's argument that the trial judge had been wrong in leaving it to the jury to say finally whether a confession was voluntary or not, his lordship had said that that was more than the prisoner was entitled to, as it gave him another chance of escape.

LORD GODDARD, C.J. [after stating the facts:] The recorder was wrong in the course which he took. It was quite right for him to hear evidence in the absence of the jury and to decide on the admissibility of the confession; and, since he could find nothing in the evidence to cause him to think that the confession had been improperly obtained, to admit it. But its weight and value were matters for the jury, and in considering such matters they were entitled to take into account the opinion which they had formed on the way in which it had been obtained. Mr. Hooper was perfectly entitled to cross-examine the police again in the presence of the jury as to the circumstances in which the confession was obtained, and to try again to show that it had been obtained by means of a promise or favour. If he could have persuaded the jury of that, he was entitled to say to them: "You ought to disregard the confession because its weight is a "matter for you".

---

(1) (1843) 12 L. J. (Ex.) 287.
(2) (1934) 24 Cr. App. R. 138.
(3) [1940] 2 K. B. 49; 27 Cr. App. R. 191.

The point, if there is any doubt about it, ought to be finally settled, as it is remarkable how many prisoners write out confessions and then dispute the admissibility of them on the ground that they were induced by a promise. It has always, as far as this court is aware, been the right of counsel for the defence to cross-examine again the witnesses who have already given evidence in the absence of the jury; for if he can induce the jury to think that the confession was obtained through some threat or promise, its value will be enormously weakened. The weight and value of the evidence are always matters for the jury.

Here the jury were told that they were not to consider that matter at all. That is a complete misdirection on a point of law, and this court has always taken the view that if a complete misdirection on an important point of law is given, that must make the conviction bad; because, as Channell, J., pointed out in this court in *Rex* v. *Cohen and Bateman* (4), it deprives the prisoner of a chance of an acquittal from the jury if the law had been otherwise stated. We feel, therefore, that although there is no reason to doubt that the confession was true, the conviction on the felony count must be quashed as the jury were not given the opportunity of considering the matter.

As to the sentence which should be passed, the appellant pleaded guilty to the misdemeanor of attempted shopbreaking. Although only thirty-three years old, he has had many previous convictions and is wholly unsuitable for the sentence of only four years' corrective training which the recorder passed on him although the Prison Commissioners' report stated that he was unsuitable for corrective training. The fact that the Prison Commissioners report that a man is suitable for corrective training or preventive detention is not of itself a reason why the court should pass such a sentence; but, when they report that a man is unsuitable for corrective training, it is undesirable for a court to depart from that opinion. That is because, if sentences of this sort are too freely passed, it will embarrass the commissioners and those responsible for administering the new form of punishment, as it will fill with unsuitable cases the places in prisons which are assigned for this particular form of treatment.

(4) (1909) 2 Cr. App. R. 197, 207.

C. C. A.
1950
Rex
v.
Murray.
Lord Goddard, C.J.

The court will pass a sentence of two years' imprisonment on the misdemeanor charge, which is the maximum sentence for an attempt; and the conviction on the first count will be quashed.

Appeal allowed.

Solicitors: *The Registrar, Court of Criminal Appeal; The Town Clerk, Lincoln.*

S. C.

Referred to. Rex v. Higgins [1952] 1 K.B. 7

REX *v.* MORRIS.

C. C. A.
1950
Oct. 23.
Lord Goddard, C.J., Morris and McNair, JJ.

Criminal Law — Conspiracy — Common-law misdemeanor — Limitation of sentence—Jurisdiction of judge—Magna Carta, 1215, *c.* 20—*Bill of Rights*, 1688 (1 *Will. & Mary, sess.* 2, *c.* 2)—*Customs Consolidation Act*, 1876 (39 & 40 *Vict. c.* 36)—*Penal Servitude Act*, 1891 (54 & 55 *Vict. c.* 69), *s.* 1, *sub-s.* 2—*Penal Servitude Act*, 1926 (16 & 17 *Geo.* 5, *c.* 58), *s.* 1, *sub s.* 1—*Finance Act*, 1935 (25 & 26 *Geo.* 5, *c.* 24), *s.* 15—*Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58).

There is no limitation on the term of imprisonment to which a person may be sentenced for a misdemeanor at common law, provided always that the sentence is not inordinate.

Where the evidence shows that the defendant to a charge of conspiracy has done no more than conspire to commit a substantive offence, he should not be sentenced for the conspiracy for a longer period of imprisonment than that which may be imposed for the substantive offence; but the court is not precluded by that principle from sentencing for a longer period where it is shown that the conspiracy was in fact one to commit also other offences, or where the substantive offence could by itself have been the subject of a number of charges for each of which he could have been sentenced separately.

Appeal against sentence.

The appellant, Charles Morris, was sentenced to four years' imprisonment by Hallett, J., at Sussex Assizes, held at Lewes in July, 1950, for conspiracy fraudulently to evade customs duties.

He was indicted on two counts: (1.) of conspiracy fraudulently to evade duties of customs, in that on divers days between May 1, 1949, and December 19, 1949, he was alleged to have conspired with other persons fraudulently to evade duties of customs on the importation of 10,116 foreign manufactured watches; and (2.) alleging that on December 19, 1949, he was knowingly concerned in a fraudulent attempt at evasion of duties of customs payable on the importation of 10,116 foreign watches, contrary to s. 186 of the Customs Consolidation Act, 1876.

The appellant pleaded guilty to the first count and not guilty to the second count. The prosecution, on the ground that the court could deal satisfactorily with him on the first count, did not ask that he should be tried on the second count and a formal verdict of not guilty was returned on that count.

Three other persons were also convicted in respect of the conspiracy.

Dutton Briant for the appellant. Here a sentence has been imposed of four years' imprisonment in respect of an offence which is a misdemeanor at common law. There is no record for over a century of a sentence for a common-law misdemeanor exceeding two years. That limit has become part of the common law by long usage. Moreover, the substantive offence of fraudulently evading customs duties is punishable by s. 15 of the Finance Act, 1935, by only two years' imprisonment. Accordingly, a judge is not entitled to pass a longer sentence for a mere conspiracy to commit that offence.

Malcolm Morris for the prosecution.

LORD GODDARD, C.J., delivered the following judgment of the court:—The trial judge, regarding the appellant as the head and fount of the conspiracy, and certainly the most blameworthy of those before the court, said that in his opinion a sentence of two years was inappropriate as insufficient, and he sentenced him to four years' imprisonment and ordered him to pay 200*l*. in respect of costs.

The case is one of considerable public importance and, indeed, the trial judge has done a public service in passing the sentence which he did so that it could be considered by this court; for the opinion has undoubtedly been widespread that in no case could a sentence of more than two years be passed for a common-law misdemeanor. This case raises two questions: first, whether the sentence is a lawful sentence; and, secondly, if it is a lawful sentence, whether or not it is too severe in the circumstances. I will consider the first point first.

At common law, it should be remembered, there were comparatively few felonies; murder, rape, arson, burglary, larceny, and the offence of mayhem were, I believe, the only common-law felonies, though there may have been others. Nor were there a great number of common-law misdemeanors. But the judges always claimed the right of defining given acts as misdemeanors, although they never attempted to do so in the case of felonies. The penalty prescribed by law for any felony except petty larceny and mayhem was death until the reign of George 4. For common-law misdemeanors the penalties of imprisonment or fine were always available, in addition to such penalties as whipping and the pillory. The pillory was abolished in the first half of the nineteenth century. It is abundantly clear—it can be seen by anybody who cares to go into the history of the matter—that the duration of the imprisonment or the amount of the fine were always at the discretion of the court. Magna Carta, 1215, contained a clause (c. 20) providing that penalties should not be excessive (see Stubbs, Charters, p. 299); and by the Bill of Rights, 1688, it was provided that excessive fines should not be imposed, nor cruel or unusual punishments inflicted. Sir James Fitzjames Stephen, the great writer on criminal law in the last century, points out in the History of the Criminal Law (vol. 1), at p. 490, that that provision was probably included in the Bill of Rights because the floggings which had been inflicted in 1685 on Titus Oates, Bedloe, and others concerned in the Popish Plot, were considered too severe, and because of a fine of 40,000*l.* which had been imposed in 1684 on John Hampden, the younger, for his part in the Rye House Plot. But there is no doubt, and it was recognized in *Reg.* v. *Castro* (1), that a court had a right to impose imprisonment and a fine at its discretion. That case is really conclusive of this appeal.

Of late years the courts have been very reluctant to impose a penalty more severe than that of two years' imprisonment, but that has been because, until the reforms which took place during the latter part of the nineteenth century, imprisonment was a severe punishment. In the days when shot drill, crank drill and the tread mill were common everyday accompaniments of imprisonment, at least of imprisonment with hard labour, a sentence of two years' imprisonment was, no doubt, regarded as a very severe sentence, and where a sentence of over two years was provided for a statutory offence the statute usually imposed a sentence of penal servitude. Penal servitude was served in convict establishments. The discipline and the work were very different from that in ordinary prisons. The Penal Servitude Act, 1891, s. 1, sub-s. 2, provided that when a sentence of penal servitude was prescribed by a statute a sentence of not exceeding two years' imprisonment could be given instead. That is why courts frequently gave sentences of imprisonment for not more than two years for offences for which penal servitude up to fourteen years, or penal servitude for life, could be given, but that did not affect their right to give longer sentences of imprisonment for common-law misdemeanors. The law was that such misdemeanors could be punished by terms of imprisonment at the discretion of the courts, and there is no statute which has taken that power from the courts.

---

(1) (1880) 5 Q. B. D. 490.

The only alteration which has been made in the history of penal punishment in this respect is, I think, that made by the Penal Servitude Act, 1926, after the decision in *Rex* v. *Morriss* (2). In that case a prisoner was sentenced by Avory, J., in effect, to three years' imprisonment for grave offences of an indecent nature punishable under the Criminal Law Amendment Act, 1885. The prisoner was sentenced to two years' imprisonment on one count of the indictment and to a further year's imprisonment on another count, the two sentences to run consecutively. For those offences penal servitude could not be given; they were punishable only by two years' imprisonment. The Act of 1926 therefore provided by s. 1, sub-s. 1, that where a person was convicted of offences for which he was liable to be sentenced in the aggregate to not less than three years' imprisonment the court might sentence him to penal servitude instead.

Long before 1948 prison discipline had become of a less rigorous character. The tread mill, shot drill and the plank bed had disappeared. The rigours of a sentence of imprisonment which had existed at the time when Charles Reade wrote in mid-Victorian days had become entirely different. Moreover, imprisonment with hard labour became almost indistinguishable from simple imprisonment, and gradually that distinction died out. And finally by the time Parliament was engaged in passing the Criminal Justice Act, 1948, there was no practical difference between the treatment meted out to prisoners sentenced to imprisonment and those sentenced to penal servitude. Prisoners who were sentenced to penal servitude and were technically convicts under the Acts were serving quite long sentences in local prisons in many cases. Convict establishments were required for other purposes and there was difficulty in getting suitable prison officers for them. In view of that, the Criminal Justice Act, 1948, abolished penal servitude and imprisonment with hard labour. It simply substituted imprisonment for the various forms of detention which had hitherto been imposed. It abolished also the old first division and second division in which imprisonment might be served and made the sentence of imprisonment the only sentence to be given in all cases.

It therefore follows that the reasons which led courts as a rule to confine sentences of imprisonment for common-law misdemeanors to two years have disappeared. Under certain statutes a sentence of three years' imprisonment could be passed in respect of some offences—the somewhat obsolete offence of blasphemy and some offences under the Excise Acts—even when the Act of 1948 was passed, but we need not now consider those because the whole system has been altered. No sentence of detention except that of imprisonment can now be passed [I need not refer to the special cases of corrective training and preventive detention which both have to be served in prison] and it is still the law—and it is just as well that it should be laid down and understood—that for common-law misdemeanors and any other offences for which a statute has not prescribed any particular period of imprisonment, the law is and always has been that the court can sentence to a term of imprisonment and a fine at its discretion, provided that it does not give an inordinately heavy sentence. If it does pass an inordinately heavy sentence prisoners now have the right to come to this court and to ask for a reduction.

---

(2) (1926) 42 T. L. R. 373.

Hallett, J., in the present case, having called attention in passing sentence to what he thought was the law, and, as we hold, rightly thought was the law, passed a sentence of four years' imprisonment, and it is said that that is too severe a sentence. In point of fact it has often occurred to me that for such offences as black-market offences or conspiracy to steal rationed goods, which we have had to punish in such numbers since the war, two years' imprisonment might be a wholly inadequate sentence. Nowadays prisoners, if they behave themselves in prison, obtain a remission and that may mean that for a particularly insidious and dangerous conspiracy a man would only serve sixteen months if he received the sentence which is widely believed to be the maximum.

In the present case the appellant was engaged in what can only be described as wholesale smuggling. It is as well that it should be understood that smuggling is a serious offence. One has only to read the old books about how smuggling was regarded in the days before free trade was established in this country—before Sir Robert Peel removed so many of the duties on imported goods—to appreciate that smuggling was always treated as a serious offence. It is now common knowledge and common, everyday history that of late years many more goods have been subjected to duty than was formerly the case. Practically everything except foodstuffs is subject to duty, and they are not only subject to duty, but are subject to purchase tax, which is another of the devices which has had to be brought in for providing revenue owing to the financial state of the country.

[His lordship reviewed the facts and continued:] The main point put forward on behalf of the appellant is that under s. 186 of the Customs Laws Consolidation Act, 1876, the maximum sentence which could have been given for the substantive offence of smuggling the watches was two years' imprisonment. That section provides that any person who "shall be in any way "knowingly concerned in any fraudulent evasion or attempt at "evasion of any duties of customs . . . shall for each such offence "forfeit either treble the value of the goods, including the duty "payable thereon, or 100*l.*, at the election of the Commissioners "of Customs; and the offender may either be detained or proceeded "against by summons". By s. 15 of the Finance Act, 1935: "Where a person is convicted of an offence under section 186 "of the Customs Consolidation Act, 1876, . . . the court may, "if it thinks fit, in lieu of ordering him to pay a penalty, order "him to be imprisoned for a term not exceeding two years". By s. 12, sub-s. 1, of the Finance Act, 1943, a person may be fined in addition to being imprisoned under that section.

Mr. Dutton Briant has argued—and I thought it was his best point—that it was not right to impose on a person, under the guise of a sentence of conspiracy, a longer sentence than could be imposed for the substantive offence he conspired to commit. At first sight that appears a very attractive argument. If a man conspires to commit an offence for which the maximum sentence is, by statute, two years' imprisonment, it is said that it is not right that a court should pass a longer sentence on him because he happens to have been prosecuted for a common-law conspiracy. That might be so in a great many cases. Where the evidence showed that the only matter in which the defendant had been concerned was one definite offence, it would obviously be wrong, by means of indicting him for conspiracy, to impose on him a longer sentence than he could have received if he had been indicted merely for the substantive offence. But in the present case the appellant has been engaged in a traffic which obviously has been going on for many months; he has had four motor-cars fitted so that this traffic can be carried on, and was smuggling on a very extensive scale. Those considerations do not therefore apply to this case. As I pointed out in argument, although, no doubt, it is customary when charging a man who is in possession of, say, fifty watches, with smuggling to make only one charge against him, such a man, no doubt, is endeavouring to evade the duty on each watch, and each item which he smuggled could be made the subject of a separate charge. For the purpose of the penalties such items are each, in effect, made the subject of a separate charge, because one takes the duty on each watch and multiplies that by three. We are concerned now, not with the case of one isolated offence, but with a case in which the judge came to the conclusion on the evidence before him, as he was well justified in doing, that the appellant had been engaged for a period of eight months either in preparing to smuggle or, probably, in actually smuggling. Therefore, in the opinion of the court, it was a case which deserved and received

C. C. A.
1950

REX
v.
MORRIS.

severe punishment in the hope that other people might be discouraged from doing likewise.

The sentence of four years' imprisonment in this case was a lawful sentence and, in the opinion of this court, it was well deserved. The appeal therefore fails.

Appeal dismissed.

Solicitors: *J. E. Dell and Loader, Brighton; Solicitor for Customs and Excise.*

L. F. J. McD.

C. A.

AMERICAN ECONOMIC LAUNDRY, LD. v. LITTLE.

1950
Nov. 22, 23.

Applied. LEWIS *v.* REEVES [1952] 1 K.B. 19

[F. P. 266]

Somervell, Jenkins and Birkett, L.JJ.

Landlord and Tenant—Rent restriction—Order for possession against statutory tenant—Suspension of execution of order—Death of tenant before order executed—Landlord's right to possession as against tenant's daughter—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17) *s.* 5, *sub-s.* 2; *s.* 12, *sub-s.* 1 (*g*).

A final order for possession having been made against the tenant of premises within the Rent Restriction Acts, he applied to the court for and obtained suspension of execution of the order. During a period of such suspension the tenant died, but his daughter, who had lived with him continuously for twelve years immediately before his death, continued to occupy the premises, and she claimed to be entitled to do so as being a "tenant" within the definition in s. 12, sub-s. 1 (*g*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

Held, that, although, by the indulgence of the court, a statutory tenant might be permitted to continue to occupy premises after the making of an order for possession, he was not, during such a period of occupation, a statutory tenant with all the rights to protection conferred by the Rent Restriction Acts which he had enjoyed before the order for possession was made; and, consequently, the daughter could not claim protection as a "tenant" under s. 12, sub-s. 1 (*g*).

Brown v. *Draper* [1944] K. B. 309; *Keeves* v. *Dean* [1924] 1 K. B. 685, considered.

Per Jenkins, L.J. A person who, by virtue of s. 12, sub-s. 1 (*g*), becomes the statutory tenant on the death of the original statutory

[Reported by Miss E. DANGERFIELD, Barrister-at-Law.]

C. A.

1950

AMERICAN ECONOMIC LAUNDRY, LD. *v.* LITTLE.

tenant takes subject to any limitations affecting the interest of the deceased, for he is entitled under the same tenancy by virtue of which the original statutory tenant was in possession. Consequently, if the daughter had derived anything under para. (*g*) it could only have been the limited interest remaining between the date of her father's death and the expiration of the extension granted to him by the court.

Bolsover Colliery Co. Ld. v. *Abbott* [1946] K. B. 8, applied.

Quære, whether the daughter's position would have been different if the order for possession made against her father had been conditional and not final.

APPEAL from Judge Leon, sitting at Clerkenwell County Court.

On September 20, 1949, the plaintiffs, American Economic Laundry, Ld., obtained an order of the court for recovery of possession against the tenant, Arthur Little, on the grounds of nuisance, of a dwelling-house within the Rent Restriction Acts.

Under the powers conferred by s. 5, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1), the execution of the order was suspended until December 20, 1949, and subsequently, on application by the tenant, a further extension was granted until January 20, 1950. The order was not executed on that date, and on March 3, 1950, the tenant, being seriously ill, applied for and obtained a further extension until April 3, 1950.

On March 8, the tenant died, but the defendant, his daughter, who had lived with him continuously for twelve years immediately before his death and was living with him when he died, continued to occupy the premises. The landlord required the defendant to leave the premises but she refused, claiming that she was entitled to remain, being a " tenant " of protected premises, as defined in s. 12, sub-s. 1 (*g*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1). It was not contended that the defendant had been guilty of any nuisance or had committed any breach of the terms of the statutory tenancy, if she had one.

The landlord took proceedings for possession, and the county

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5, sub-s. 2 : " At the time of the application for or the making or giving of " any order or judgment for the " recovery of possession . . . the court " may . . . stay or suspend execution " on any such order or judgment, or " postpone the date of possession, for " such period or periods as it thinks " fit, and subject to . . . conditions " . . . and, if such conditions are " complied with, the court may, if it " thinks fit, discharge or rescind any " such order or judgment ".

Section 12, sub-s. 1 (*g*): " the " expression 'tenant' includes the " widow of a tenant dying intestate " who was residing with him at the " time of his death, or, where a " tenant dying intestate leaves no " widow or is a woman, such member of the tenant's family so " residing as aforesaid as may be " decided in default of agreement by " the county court ".

court judge held that, as the tenant had not been dispossessed at the time of his death, but was retaining possession by virtue of the Rent Acts, he was a tenant for the purposes of the Acts, and consequently his daughter was within the definition of " tenant " in s. 12, sub-s. 1 (*g*). The landlord appealed.

Niall MacDermot for the landlord. On the making of the final order for possession, the father ceased to be a statutory tenant, and consequently at his death there was no interest which could pass to his daughter under s. 12, sub-s. 1 (*g*). The statements by Lord Greene, M.R., in *Brown* v. *Draper* (2), read literally, mean that a statutory tenancy comes to an end immediately an order is made. Those statements, and the apparently conflicting remarks by Scrutton, L.J., in *Keeves* v. *Dean* (3), were directed to questions different from those which arise here; but in *Brown* v. *Draper* (2), the date when the statutory tenancy ended was a point which was necessary to the decision. Further, that case was cited with approval in *Foster* v. *Robinson* (4).

If, by the clemency of the court, execution of an order is suspended, the tenant is able to remain in possession for the period of the extension, and to apply for further extensions. In some respects his rights during a period of extension are similar to those which he enjoyed as a statutory tenant; but it does not follow that he has all the rights of a statutory tenant, or that he is a " tenant " for the purpose of s. 12, sub-s. 1 (*g*).

[For the assistance of the court, counsel then referred to the contrary argument, supported by the observations of Scrutton, L.J., in *Keeves* v. *Dean* (3), and by *Tickner* v. *Clifton* (5).]

After the first period of extension granted by the court had expired, the ex-tenant could have applied to the court for a further extension to legitimize ex post facto his continued occupation; but, until a further extension was granted, he could have been turned out by the landlord at any time. A further extension was subsequently made, but that could not give him greater rights than he had had before, except in so far as it enabled him to remain in possession for the period of extension.

Alternatively, if the making of the order did not determine the statutory tenancy so that it devolved on the daughter under s. 12, sub-s. 1 (*g*), she took subject to all the clogs and burdens affecting her father's tenancy. [He referred to *Bolsover Colliery Co. Ld.* v. *Abbott* (6), and *Littlechild* v.

(2) [1944] K. B. 309, 312.
(3) [1924] 1 K. B. 685, 694.
(4) Ante p. 149.
(5) [1929] 1 K. B. 207.
(6) [1946] K. B. 8.

Holt (7).] The interest which devolves on a person residing with the statutory tenant immediately before his or her death as required for the purposes of s. 12, sub-s. 1 (*g*), is not a new statutory tenancy, and the successor in title of the deceased statutory tenant cannot have a right which his or her predecessor had not. Consequently, if anything devolved on the defendant, which is denied, she succeeded to a right which determined when the period of extension granted to her father expired.

The order made by the court here was a final and absolute order. A distinction is drawn in s. 5, sub-s. 2, between this type of order and one which is conditional and may be discharged if the conditions are observed. In *Foundling Estates, Ld.* v. *Tarnow* (8), it was conceded that, as soon as an absolute order is made, the statutory tenancy determines.

The defendant in person.

Somervell, L.J. [read s. 12, sub-s. 1 (*g*), of the Act of 1920, stated the facts, and continued]: The question as stated at the beginning of his argument by Mr. MacDermot was whether a tenant against whom a final order for possession has been made is a tenant within s. 12, sub-s. 1 (*g*). That definition of " tenant " like all the definitions in the Act of 1920, is to be read as applying except where the context otherwise requires. The judge decided that the defendant was within that definition and could remain in possession. In a long and careful judgment he said, and I agree with him, that the point is not free from difficulty. He referred first, to two statements in *Brown* v. *Draper* (9), where Lord Greene, M.R., used more than once words to this effect: " the only ways in which " a tenant " can be " deprived of the protection of the Acts are (a) by giving up " possession, in which case no order for recovery of possession " against him is required; (b) having an order for recovery of " possession made against him ".

Those words, read literally, might be taken to indicate that the order for possession in itself deprived him of the protection of the Act. On the other hand, the county court judge referred to this statement by Scrutton, L.J., in *Keeves* v. *Dean* (10): " I take it that " the tenant " has a right as against all the " world to remain in possession until he is turned out by an " order of the court ". The difference between the literal meanings of those two statements of the law is illustrated by this case. I agree with the county court judge, in that I do not think that Lord Greene had in mind what we have to consider here, namely, the position of a tenant, a person who has been a statutory tenant (I am not begging the question by using the word "tenant" but it is a convenient expression) between the time when the order for possession is made and the time when it falls to be executed having regard to a suspension granted under s. 5, sub-s. 2, of the Act of 1920. I do not think that that point was in the mind of either Lord Greene or Scrutton, L.J., but the former in the words above quoted, expressed something with which I respectfully agree, and which seems plain, namely, that an absolute order for possession made against a tenant fundamentally alters the position.

---

(7) [1950] 1 K. B. 1.

(8) [1948] Estates Gazette Digest 273.

(9) [1944] K. B. 309, 312.

(10) [1924] 1 K. B. 685, 694.

The county court judge having regard to those two statements, which on the face of them point to different moments in a case where the order is not immediately executed, proceeded to consider the matter broadly on these lines: he posed for himself the question whether the tenant after the order for possession had been made and while it was in suspension was a statutory tenant. There are admittedly many respects in which such a person is at any rate in the same position as a statutory tenant: for example, the landlord could not raise his rent. As has been said, the tenant might be regarded as being in possession by licence of the court. No doubt there are certain respects in which his position quoad the man to whom he is paying mesne profits is during the interval very much the same as it was before. I agree with my brother Jenkins' observation, made in the course of the argument, that the position of someone against whom an order for possession has been made, and then suspended at common law or under s. 5, sub-s. 2, of the Rent Act of 1920 is sui generis. I do not think that the problem which we have to solve is really assisted by considering in what respect his position is the same quoad the landlord as it was before the order was made. It is obviously fundamentally different in this respect, that, whereas before, he was entitled to the protection of the Act until successful proceedings were taken, he is now in the position that proceedings have been taken and that an order for possession has been made. All that he has is a right to apply for postponement under s. 5, sub-s. 2. In my opinion a tenant in that position, that is to say where an absolute order for possession has been made against him, notwithstanding that it may be suspended, is not a tenant for the purposes of s. 12, sub-s. 1 (*g*). That I think is in accordance with a common-sense application of the paragraph. It would be an illogical result, I think, if the paragraph gave a protection to a widow which the court had expressly taken away from her deceased husband, on whose tenancy she relies, that tenancy having been brought to a suspended end by the order for possession.

I am reinforced in that view by a case to which we were referred, concerned with an analogous though not identical question, namely, *Bolsover Colliery Co. Ld.* v. *Abbott* (11). There the premises in question had originally been let to a tenant in the employment of the landlord (a position covered by para. (*g*) of Sch. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933). That Schedule specifies the cases in which an order for possession may be made without proof of suitable alternative accommodation. The case in para. (*g*) is where "the dwelling-house is reasonably required by the landlord for "occupation as a residence for some person engaged in his whole-"time employment . . . and either (i) the tenant was in the "employment of the landlord or a former landlord, and the "dwelling-house was let to him in consequence of that employ-"ment and he has ceased to be in that employment . . .". Thus, to take the *Bolsover* case (11), if the original tenant ceased to be in the employment of the landlords, they, if the other conditions were satisfied, would have the right to invoke para. (*g*) and satisfy the county court judge that it would be reasonable to make an order for possession. But the tenant died, having continued in his employment until his death. When he died in 1941, his son, who had been residing with him for the necessary period, claimed to continue in possession as a tenant within the definition in s. 12, sub-s. 1 (*g*). In 1945 the landlords required the house for occupation by a person in their whole-time employment. The defendant declined to give up possession, and their claim to recover possession was dismissed by the county court judge.

The headnote (in the Law Reports) illustrates the similarity between that and the present case. It was "*Held*, that the father's tenancy was subject to defeas-"ance by the plaintiffs on his ceasing to be in their "employment by virtue of the provisions of para. (*g*) (i) of "the Rent and Mortgage Interest Restrictions (Amendment) Act, "1933; that, when the defendant succeeded to that tenancy, it "remained subject to the same defeasance; and therefore the "plaintiffs, having established that they required the house for "occupation by a person in their whole-time employment, were "entitled to an order for possession".

At the conclusion of his judgment Scott, L.J., said (12): "The right of the landlord and the liability of the tenant are "co-extensive in that respect, and a tenancy carried on by the "provisions of the Act as to the succession of a widow or other "relation is the same tenancy with its advantages and disadvan-"tages unaltered. I therefore think that the appeal should be "allowed". That is of importance for present purposes, although I do not think that it is necessarily conclusive of this case. It illustrates the principle which has led me to the conclusion that in the circumstances of this case, when the father died the defendant acquired no rights which she could exercise under s. 12, sub-s. 1 (*g*), of the Act of 1920.

---

(11) [1946] K. B. 8.

(12) Ibid. 12.

Mr. MacDermot, who, the defendant being in person, assisted the court by putting the arguments on both sides, referred to the fact that, under s. 5, sub-s. 2, of the Act of 1920, orders for possession may take either of two forms: there may be, as here, an absolute order the execution of which is suspended: or there may be a conditional order, that is to say, the order for possession does not become operative so long as certain conditions are fulfilled, for example, payment of rent or abatement of a nuisance. The difference between those two kinds of order is illustrated by these concluding words of the subsection: " if such conditions ", that is to say, conditions to which an order is made subject " are complied with, the court " may, if it thinks fit, discharge " the order. That cannot be done when an absolute order has been made; it can only be done if the order is made conditional. I have only referred to that matter in order to make it clear that I am not deciding what the position would be in a case of this kind where a conditional order had been made against the deceased tenant: it may be that the result would be the same; it may be that it would be different. At any rate, there seems to me to be scope for argument which would require serious consideration, that different results would ensue. Therefore it is better to leave that question to be decided if and when it arises. The appeal will be allowed.

Jenkins, L.J. I agree. The expression " statutory tenancy ", as I understand it, is a compendious expression to describe the right of a tenant of protected premises to remain in possession of those premises, notwithstanding the determination of his contractual interest until such time as either he voluntarily gives up possession, or the court, on cause shown, makes an order against him to deliver up possession. In the latter alternative there will, in most, if not all, cases, be a period of time between the date when the order for possession is made and the date set by the court under s. 5, sub-s. 2, of the Act of 1920 as the date on which the order is to be complied with.

The tenant here died after the date of the order for recovery of possession against him but before the expiration of the last of a series of extensions which had been made by way of postponement of the date on which the order was to be complied with. What, then, was his position? It is said that, notwithstanding the order for possession, he was still a statutory tenant. To say that seems to me really to beg the question. It may well be that he could be described as a statutory tenant; but that description would not itself accurately define his precise position, for he was a statutory tenant against whom a final order had been made, under which possession was to be delivered up on a fixed date, April 3, 1950, he having died on the previous March 8. During the intervening period between the date of such an order and the date fixed for delivery of possession it may very well be, and indeed obviously must be, that the statutory tenant has certain rights and certain obligations. For instance he would have to pay the equivalent of the rent during the period of his occupation between the date of the order and the date of giving up possession. But that is not to say, and it obviously cannot be the case, that he is still the statutory tenant for all purposes, so as to be in the same position as if the order had never been made. He has nothing left but the limited interest granted to him by what may perhaps be described as the indulgence of the court under s. 5, sub-s. 2, of the Act of 1920. In effect he has a period of grace.

That being the character of the statutory tenant's interest after the order for possession has been made, what effect, if any, can be given to s. 12, sub-s. 1 (*g*), under which, on the death of a statutory tenant, a member of the tenant's family residing on the premises becomes the statutory tenant? It was held by the judge that that provision still remained of full force and effect, and that the defendant here became, on the death of her father, the statutory tenant under a new statutory tenancy which was hers and nobody else's and which would continue to be enjoyed by her in her own right until such time as some new ground for claiming possession arose and the landlords successfully applied for and obtained an order for possession. That would be to my mind a most surprising result; and, notwithstanding the reasons to the contrary stated by the judge, I agree with my Lord that there is really no warrant for the judge's conclusion on a consideration of the relevant statutory provisions.

I agree that the right principle to be followed is that stated in *Bolsover Colliery Co. Ld.* v. *Abbott* (13), which shows that the member of the family who becomes statutory tenant on the death of the original tenant, although in a sense claiming in his or her own right, that is to say, although not claiming under the statutory tenant in the same way as an assignee or legatee of a contractual tenancy may be said to claim under the grantor or testator, nevertheless becomes statutory tenant under the same tenancy by virtue of which the original statutory tenant was in possession. Thus in the present case, assuming in the defendant's favour that notwithstanding the existence of the final

(13) [1946] K. B. 8.

C. A.
1950

AMERICAN ECONOMIC LAUNDRY, LD.
v.
LITTLE.

Jenkins, L.J.

order for possession, she could still become statutory tenant of the premises by virtue of s. 12, sub-s. 1 (*g*), of the Act of 1920, it seems to me at all events clear that the tenancy to which she in effect succeeded could be no more than the limited interest remaining to run between the date of the death and the expiration of the date fixed for possession by the order.

The point is a novel and interesting one and illustrates once more the infinite variety of arguable questions that can be raised under these Acts.

I have thought it right, in deference to the careful judgment of the judge, to express in my own words my reasons for feeling that he came to a wrong conclusion. For these reasons, and those stated by Somervell, L.J., I agree with him that the appeal should be allowed.

BIRKETT, L.J. As I agree so fully with the reasons which have been stated for allowing the appeal, I content myself with saying that I agree.

Appeal allowed.

Solicitors: *Foss, Bilbrough, Plaskitt & Co.*

C. A.

1950
Oct. 11, 12.

Bucknill, Singleton and Birkett, L.JJ.

BEADSLEY *v.* UNITED STEEL COMPANIES, LD.

[1949 B. 521.]

Factory—Fatal accident—Negligence—Chains, ropes and lifting tackle—"No . . . lifting tackle shall be used unless it is of good construction, "sound material, adequate strength, and free from patent defect"—Construction—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 23, *sub-s.* 1 (*a*).

A workman employed in the defendant's steel works sustained fatal injuries, when a mould, weighing several tons, fell upon him. The mould was being lifted by an overhead crane from one part of the works to another part. For this work the defendants had supplied what were called stirrup slings, which effectively secured a mould when it was being lifted; but on the occasion in question the workman engaged in slinging, instead of using a stirrup sling, made use of a three-fold chain sling intended for lifting plates and covers, which was already attached to the crane, and this tackle failed to hold the mould.

The Factories Act, 1937, by s. 23, sub-s. 1, provides: "(*a*) no "chain, rope or lifting tackle shall be used unless it is of good "construction, sound material, adequate strength and free from "patent defect".

In an action for damages by the widow and administratix of the deceased workman the trial judge held that s. 23 required that the tackle should be of good construction for the purpose for which it was being used, and that therefore the defendants were in breach of their statutory duty. On appeal by the defendants.

Held, that the words " No . . . lifting tackle shall be used unless it " is of good construction " were capable of an ordinary natural meaning, and no condition of suitability ought to be read into them; and that, as the good construction of the tackle used was not questioned, the employers were not in breach of their statutory duty.

APPEAL from Ormerod, J.

On June 23, 1948, the deceased man, George Beadsley, was engaged in setting moulds on a casting car at the defendants' steel works, and another employee, one Ellis, was engaged in slinging moulds, so that they could be lifted overhead by a crane and taken from one part of the works to another part. For this purpose the employers had provided stirrup slings, but on the occasion in question Ellis negligently used a three-fold chain sling intended to be used for lifting plates or covers which was already attached to the crane, with the result that, as it was being lifted, a mould slipped from the sling and fell on to the deceased. The plaintiff, Mrs. Averhilda Beadsley, suing as widow and administratrix of the deceased, on behalf of herself and two infant children, claimed damages for breach of statutory duty under s. 23, sub-s. 1, of the Factories Act, 1937.

The action was tried at Leeds assizes by Ormerod, J., who held that the defendants were guilty of a breach of statutory duty under s. 23 (1), which section, he said, required that the tackle used should be of good construction for the purpose for which it was being used. He therefore awarded damages amounting in all to 2,840*l*.

The employers appealed, contending that the insertion of the requirement of " suitability for the purpose " was not justified by the words of s. 23, sub-s. 1.

Nelson, K.C., and *Norman Black* for the defendants. The material words of s. 23, sub-s. 1, are " of good construction ", because it cannot be suggested that the sling in question was not of sound material or adequate strength, or defective. There is no direct authority as to the meaning of the section, but the judge has read into it something which is not there and which puts a heavy and unjustifiable burden on the employer. It amounts to saying that an employer who provides an apparatus, which is of good construction, for a particular purpose, commits a breach of statutory duty if his servant, in breach of duty, uses the wrong apparatus.

---

(1) The Factories Act, 1937, s. 23, sub-s. 1: " The following provisions " shall be complied with as respects " every chain, rope or lifting tackle " used for the purpose of raising " or lowering persons, goods or " materials:—(*a*) No chain, rope or " lifting tackle shall be used unless " it is of good construction, sound " material, adequate strength and " free from patent defect ".

It is submitted that the words of s. 23 must be taken as they are, without extension, and that the employer has performed his statutory duty when he provides lifting tackle of good construction. Where the statute requires the provision of something suitable for a particular purpose it specifically says so (see s. 30). Section 23 is a penal section and nothing ought to be read into it unless it is necessary so to do in order to give effect to it.

Beney, *K.C.*, and *F. Denny* for the plaintiff. There appears to be no authority on the question at issue, but it is submitted that the judge came to the right conclusion. Section 23 states four requirements, and each of those requirements must be looked at separately. Parliament must have contemplated that the purposes for which a chain, rope or lifting tackle was to be used might differ, and that therefore, in determining whether a thing was of good construction, sound material, adequate strength, or free from patent defect, it was necessary to know the purpose for which it was going to be used. Thus " adequate " strength " requires consideration of the weight of the load. It is not possible to construe the section without considering the nature and weight of the load to be lifted. If the defendants' contention is right an employer will have complied with the section if he only provides slings which are of no use for lifting moulds. " Good construction " cannot be decided by merely looking at the lifting tackle. It must be good construction for the purpose for which it is going to be used.

BUCKNILL, L.J. I will ask Singleton, L.J., to deliver the first judgment.

SINGLETON, L.J., stated the facts and continued:—The judge discussing the alleged breach of statutory duty said: " There " is no doubt, on any ground in this case (and it is admitted on " all hands) that the tackle which was in fact used was unsuitable " and improper for this particular purpose. That, neither Mr. " Black nor anybody he called seeks to dispute for a moment ". The cause of this accident was that the wrong lifting tackle was used, though the evidence showed that the proper lifting tackle of two chains fitted with stirrups was immediately available to the workman Ellis if he had thought it right to use it. The cause of this accident, which resulted in the death of a workman, was that another workman did not take the trouble to take off the lifting tackle which was already on the sling, but decided to take the risk and used something which he ought not to have used for the purpose of lifting the mould. In those circumstances counsel for the plaintiff widow submitted to the judge that s. 23, sub-s. 1, of the Factories Act of 1937 applied. The judge came to the conclusion that it did.

The submission on behalf of the plaintiff was that the lifting tackle which was used was not of good construction and it was said that it was not of good construction because the chain with the hooks at the end was not suitable for carrying a mould of this kind. Much argument has been addressed to us on the meaning of sub-s. 1 (*a*). Mr. Denny, who followed Mr. Beney on behalf of the plaintiff, drew the attention of the court to the words "adequate strength". He said that, though the marking of chains, hoists and the like is prescribed in para. (*b*), and certain offences are created by it, it is no answer, in a case in which a chain breaks, if in fact the chain is inadequate for the work to which it is put, to say that it complied with sub-s. 1, para. (*b*). That may or may not be right; for myself I am inclined to take the view that s. 23 provides something in the nature of a code, and that where it does place a duty on the employers that is an absolute duty. I do not think it necessary to consider at any length the other words in sub-s. 1 (*a*). I think it sufficient to read the first line and a half: "No chain, rope or lifting tackle "shall be used unless it is of good construction". How is that to be determined?

Mr. Nelson, on behalf of the employers, submitted that the meaning given by the judge to that part of the sub-section meant reading into it something which was not there at all. The judge indeed said this: "It seems to me that the meaning of those "words must be that if lifting tackle is used for any particular "purpose, whether the man who is using it is an employee who "has made a mistake and used the wrong tackle or not, there "must be a breach of the section". Earlier he had said: "I "am satisfied that what the section does mean is that it should "be of good construction for the purpose for which the tackle "is being used, which means that it must be constructed in "such a way that it can properly be used for the particular "purpose".

That requires, Mr. Nelson submitted, reading words into the sub-section which are not there, and he pointed out that this sub-section creates penal offences and that nothing ought to be read into it unless it is necessary so to do in order to give effect to the sub-section. In my view it is not necessary to read anything into the sub-section at all. The words "No . . . lifting tackle "shall be used unless it is of good construction" are capable of an ordinary natural meaning, and the question arises: whether the lifting tackle in question here was of good construction. No one has addressed a word of argument to the effect that the tackle was not perfectly good and of perfectly good construction.

Mr. Black, who followed Mr. Nelson on behalf of the defendant employers, asked us to consider the word " suitable " which the other side wished to read into the sub-section and to see whether it was necessary to do so or not. He referred the court to other places in the Act in which the word " suitable " appeared. One was s. 30, where the word " suitable " appears on a number of occasions. Mr. Black put this further argument before the court which impressed me: he said that the court had to consider whether the chain, rope or lifting tackle was of good construction, and that if the plaintiff were right, the result would be that that same chain, rope or lifting tackle would one day be of good construction and the next day of bad construction, and perhaps in the next hour of good construction again, according to the use to which it was put. I cannot think that s. 23, sub-s. 1, can have been intended to cover anything like that.

No attack has been made on this chain or lifting tackle in regard to its actual construction, and I have reached the conclusion that the judge was wrong in his decision that the employers were in breach of s. 23, sub-s. 1, of the Act of 1937. This Act, as its predecessor did, puts a heavy burden on the employers. Where a duty is laid on the employers that duty is absolute and a breach of it entails, or may entail, criminal prosecution. It did not make the employers responsible for every thing that a workman did. Though the later Act went very much beyond the earlier Act and the regulations, it recognized still that, however good employers may be, and whatever efforts they may make to comply with their statutory obligations, accidents will, or may, happen through the carelessness of a workman.

If the legislature had intended to make the occupier of a factory responsible because a chain or lifting tackle which was not suitable was used, it would have been quite easy to say: " no chain, rope or lifting tackle shall be used unless it is of " good construction, sound material, adequate strength, free " from patent defect and suitable for the purpose for which it " is used ". Those last few words do not appear and they are not part of the law. It seems to me that some such words as those must be read into sub-s. 1 (*a*) if it is to be said that, on the facts of this case, there was a breach of their statutory duty by the employers. Accordingly I take the view that the judge was wrong in the decision at which he arrived.

[His Lordship negatived, after a consideration of the evidence, the plaintiff's contention that there was a breach by the employers of the duty owed to their workmen at common law, and concluded.] In my judgment this appeal ought to be allowed.

BIRKETT, L.J. I agree. The first question for decision is the construction of s. 23, sub-s. 1 (*a*), of the Factories Act, 1937, and it is important to notice that the words of this particular sub-section "of good construction, sound material, adequate "strength and free from patent defect", are to be found in several sections in this Act of Parliament. The only words with which this court is concerned are the words "good construction". The judge has said that those words "good construction", must not just be looked at as simple English words, but that something must be imported into them. The judge said: "The question "that has to be decided here as has been put by Mr. Black in "the course of a very able argument, is this: Was this lifting "tackle of good construction? Was it free from patent defect; "and, if it was of good construction generally for the purpose "for which it was intended; but if construction imports suitable "design for the purpose for which it is being used, does the "fact that a negligent employee using tackle for the purpose "for which it is not designed when suitable tackle is available "still render the employer liable for a breach of the section?"

I am not quite certain from that paragraph whether that is really Mr. Black's submission, or whether only the first part of it is; the second part being put by the judge. It does not matter, for the judge continues, and this is the gist of the matter: "I have come to the conclusion in this case, that on the "wording" [and he reads it] 'no chain . . . shall be used unless "'it is of good construction', it must mean that the tackle "which is used for the particular piece of work which is being "done must be of good construction for that purpose. I am "asked by Mr. Black to say that good construction cannot "mean good design; that a chain may be of good construction "and therefore comply with the section, and still be in every way, "as this was, unsuitable for the work which had to be done". It is quite plain from that passage that what the judge has done is to import into the section the element of suitability, fitness for a particular purpose; and the sub-section on the face of it says no such thing.

The first matter that occurs to me is that if it was really intended, and if the true construction of that sub-section is, that the element of suitability should be imported, I cannot see why, in such a detailed statute, that was not expressly stated. It is a familiar argument, whenever the construction of a statute, or a statutory rule or order, or a regulation is under review, that if the enactment is to be read in that way, why did not Parliament make it do so, which would have been easy.

That is strongly supported by the argument of Mr. Black. He referred not merely to s. 23, but also to s. 30 of the Act, a section concerned with steam receivers and steam containers,

C. A.

1950

BEADSLEY
v.
UNITED
STEEL COMPANIES, LD.

Birkett, L.J.

in which the words appear: " . . . shall be fitted with (a) a "suitable reducing valve or other automatic appliance; (b) "a suitable valve so adjusted as to permit the steam to "escape . . . ; (d) a suitable stop valve", and so on, expressing the very element of "fitness for the purpose" or "suitability". The argument at once comes to mind: if it could be expressed in s. 30, and it was intended that s. 23 should have the same obligation, why not say it there. Section 30 has in sub-s. 3 the words "every part of every steam receiver "shall be of good construction, sound material, adequate strength "and free from patent defects"; the very words of s. 23, yet all these matters of suitability have also been prescribed. I can quite see that in the case of other matters like steam receivers it may be more feasible to state in the Act itself particulars in which fitness or suitability shall be laid down, but it is important to notice that sub-s. 3 of s. 30 uses the very same words. I observe also that s. 31 of this Act, concerning air receivers, refers to a suitable safety valve, a suitable appliance for draining the receiver, a suitable manhole, hand hole, and so on—elements of fitness again, yet sub-s. 3 also provides: "Every air receiver "and its fittings shall be of sound construction and properly "maintained".

Those considerations lead me to the view that these words "good construction" really mean "well made". It must not be a faulty thing, but well made; and no ground exists for importing, as the judge has done, the element of fitness or suitability into the construction of s. 23, sub-s. 1.

I am also very much influenced by the fact that this is a penal section. We were referred to *London and North Eastern Railway Co.* v. *Berriman* (2), where Lord Simonds said: "It "is enacted by s. 11, sub-s. 1 of the Act under consideration that, "if any railway company acts in contravention or fails to comply "with any rule made under the Act, it shall be liable for each "offence on conviction under the Summary Jurisdiction Acts "to a fine not exceeding fifty pounds. I think that the same "rule of construction must apply whether the duty and the "penalty are imposed by the same section of an Act or by "different sections of an Act or the one by a rule made under "the Act and the other by the Act itself. That rule of con"struction is very well settled; though not always easy of appli"cation. I will state it by three familiar citations. In *Tuck* "*and Sons* v. *Priester* (3), Lord Esher, M.R., said: 'We must "'be very careful in construing that section, because it imposes "'a penalty. If there is a reasonable interpretation which "'will avoid the penalty in any particular case, we must adopt

---

(2) [1946] A. C. 278, 312.

(3) (1887) 19 Q. B. D. 629, 638.

" 'that construction. If there are two reasonable constructions " 'we must give the more lenient one. That is the settled rule " 'for the construction of penal sections'. Lindley, L.J., in "the same case said (4): '. . . the well-settled rule that the " 'court will not hold that a penalty has been incurred, unless " 'the language of the clause which is said to impose it is so clear " 'that the case must necessarily be within it'. Finally I will "cite the words of James, L.J., delivering the judgment of the "Privy Council in *Dyke* v. *Elliott* (5): 'Where the thing is " 'brought within the words and within the spirit, there a penal " 'enactment is to be construed like any other instrument " 'according to the fair common sense meaning of the language " 'used and the court is not to find or make any doubt or " 'ambiguity in the language of a penal statute where such doubt " 'or ambiguity would clearly not be found or made in the " 'same language in any other instrument' ".

It has never been in dispute that the employers have in fact provided equipment suitable for its purpose. The only trouble was that a workman did not use the proper appliance. Further, it cannot be disputed that the equipment which was in fact used by mistake was of sound construction in the ordinary connotation of those words. All that is found is that it was unsuitable for the particular job for which that workman was using it. It would be strange if it could be said that the employer had provided the proper appliance and that it was of sound construction, adequate strength; but that, because a workman had mistakenly used something else, he had failed in his statutory duty.

The judge treated the case as one where the duty was one of absolute prohibition against the user. He said: "So far as "concerns the argument that it is sufficient for the employer "to provide suitable tackle and that then, if the wrong tackle "is used by one of the workmen for doing some particular work, "the responsibility is no longer on the employer, that argument "I think must fall to the ground from the words of the section. "The section does not say that 'chains, ropes and lifting tackle " 'shall be provided of good construction and sound material', "and so on. It says, 'no chain, rope or lifting tackle shall be " 'used'. It seems to me that the meaning of those words "must be that, if lifting tackle is used for any particular purpose, "whether the man who is using it is an employee who has made "a mistake and used the wrong tackle or not, there must be a "breach of the section. It is presumably put in those words "to provide for that particular happening; and it may be unfortunate from the point of view of the employer that he

---

(4) 19 Q. B. D. 645.

(5) (1872) L. R. 4 P. C. 184, 191.

C. A.

1950

BEADSLEY v. UNITED STEEL COMPANIES, LD.

Birkett, L.J.

"should be held responsible for the carelessness of one of his "workmen in using the wrong tackle. But that is a matter for "the legislature and, if they have used the words 'no chain "' . . . shall be used unless it is of good construction', then it "does seem to me that the employer cannot cease to be liable "merely because, although it has been used, it has been used "because one of his employees has made a mistake".

With great respect to the judge, I think that there is a fallacy underlying all that. Nobody doubts in this case that the obligation laid upon the employer is in its nature absolute, whatever the obligation may be; but what the judge is there saying is that the statutory obligation which is absolute is that the employer shall not use tackle which is not suitable for the purpose, whereas the employer says that the prohibition which is absolute is that he shall not use tackle that is not of good construction. My view is that if s. 23 is examined, good construction, sound material, adequate strength and free from patent defect are seen to be general matters which have no reference at all to any particular purpose; the words cannot be considered as meaning good construction for some particular purpose. Therefore I agree with the judgment of Singleton, L.J.

BUCKNILL, L.J. I also agree that the appeal of the defendants should be allowed. It is an important case, and there does not seem to be any direct authority on the point. I would only refer to the Scottish case of *Reilley* v. *William Beardmore and Co., Ld.* (6), where the Court of Session had to consider the interpretation of s. 23 of the Act of 1937. The facts were that an employee in a factory, injured owing to the parting of the cable of a crane, brought an action for damages against his employers on the ground that the cable had not complied with the conditions in s. 23, sub-s. 1 (*a*), of the Act of 1937. The Sheriff-substitute found in favour of the plaintiff, apparently on the ground that he was of opinion that if a cable broke down while it was being used the Act had not been complied with.

On appeal to the Court of Session the plaintiff held her judgment, but Lord President Cooper said this on the meaning of the sub-section (7): "In two passages in his note, which were "subjected to criticism, the learned Sheriff-substitute has, in "my view, stated too highly the obligation upon the factory "occupier under this section. He says: 'If a cable breaks down "'while it is being "used", which is what this cable did here, "'I am of the opinion that the Act has not been complied with'; "and a little later he adds: 'I consider that the obligation which "'it [the statute] imposes is absolute, and that, if a cable breaks

---

(6) 1947 S. C. 275.

(7) Ibid. 278.

"'in use, a liability for the consequence is imposed on the "'users'. So to put the matter is, in my view, to overstate "the absolute character of the obligation imposed by the statute "and to make liability an automatic and inevitable consequence "of the bare fact that a rope broke in use".

If a rope breaks in use it obviously is not of adequate strength for the work for which it is being used; but if the argument which has been put forward here on behalf of the plaintiff is sound, I think that the inadequacy of the rope, whatever the task imposed upon it was, would entitle her to judgment. I do not see any difference between the interpretations to be placed on "adequate strength" and "good construction". I agree with the judgments which have been delivered.

Appeal allowed.

Solicitors: *Bell, Brodrick & Gray for Harold Jackson & Co., Sheffield; Jackson & Jackson for J. W. Fenoughty Ashton & Co., Sheffield.*

A. W. G.

HOWARD *v.* PICKFORD TOOL CO. LD.

[1950 H. 857.]

C. A.
1950
Nov. 27.

Evershed, M.R., Asquith and Singleton, L.JJ.

Procedure—Master and servant—Servant's claim to declaration that service agreement repudiated by master—Servant still in master's employment—R. S. C., Ord. 25, *r.* 5.

By an agreement of May, 1950, the defendant company agreed to employ the plaintiff as joint managing director for a period of six years. He brought an action against them and by his statement of claim alleged that the defendants had shown by the conduct of their chairman that they no longer intended to be bound by the agreement. He claimed a declaration that the conduct of the defendants was such as to constitute a repudiation by them of their contract so that he was excused from further performance of his obligations under it. He had not ceased to carry out his duties under the contract. The defendants applied under R. S. C., Ord. 25, r. 4, to have the statement of claim struck out.

Held, that, while the jurisdiction conferred on the court by Ord. 25, r. 5, to make a declaratory order was most valuable in appropriate cases, it should not be used to answer academic questions as would be the case if a declaration were made here, for since the plaintiff was still performing his part of the contract, the alleged acts of the defendants were wholly nugatory and insufficient in law to constitute repudiation. A declaration that the plaintiff might at the time have accepted the acts of the defendant as a repudiation

C. A.

1950

HOWARD
v.
PICKFORD
TOOL CO.
LD.

would not involve the result that he could nunc pro tunc rely on them as a repudiation and accept them as such. Moreover, if the plaintiff obtained the declaration sought, another action would be inevitable. The statement of claim should accordingly be struck out.

Société Maritime et Commerciale v. *Venus Steam Shipping Co. Ld.* (1904) 9 Com. Cas. 289, and *Spettabile Consorzio Veneziano di Armamento e. Navigazione* v. *Northumberland Shipbuilding Co. Ld.* (1919) 121 L. T. 628, considered.

APPEAL from McNair, J., in chambers.

The plaintiff, Walter Howard, by his statement of claim in this action alleged that by an agreement dated May 31, 1950, made between himself of the one part and the defendants, Pickford Tool Co. Ld. of the other part, it was agreed that the defendants should employ the plaintiff as joint managing director of the defendant company for a period of six years from January 1, 1950. The plaintiff alleged in para. 3 that it was an implied term of the agreement that the powers, duties and directions given to him by the company should be reasonable and that he should be permitted without undue interference by the defendants to carry on his employment as joint managing director. By para. 4 he alleged that the defendants by the conduct of their chairman in September, 1950, had not performed the implied terms and obligations of the contract, and particulars of the conduct of which the plaintiff complained were given.

The statement of claim then continued: " By reason of the " conduct of the chairman as aforesaid it has become impossible " for the plaintiff to perform his part of the said agreement " although he has been and is willing and ready to do so and " the plaintiff will say that such conduct on the part of the said " chairman has shown that the defendants intend no longer to " be bound by the said agreement or that, in the alternative, " such conduct is incompatible with its due performance ". The plaintiff further alleged that the defendants were in breach of the agreement and claimed damages for the breach.

When the matter came before the master, it was shown by proper evidence that, notwithstanding the allegations of impossibility, the plaintiff was in fact still acting as managing director under the agreement; and it was plain from that fact that there could be no claim for damages. The master therefore directed that the statement of claim should be struck out. When the matter came before McNair, J., in chambers, counsel, who had not settled the statement of claim in its original form, asked leave to amend the claim or prayer at the end of the statement of claim by substituting for the claim for damages a claim for a declaration in the following terms: " The plaintiff therefore says " that the defendants are in breach of the said agreement and

C. A.

1950

Howard
v.
Pickford
Tool Co.
Ld.

" claims a declaration that the conduct of the defendants set " forth in para. 4 hereof is such as to constitute repudiation by " the defendants of the contract and that the plaintiff is excused " further performance of his obligations under the contract ".

McNair, J., subject to that amendment being made, permitted the action to proceed. The defendants appealed.

C. D. Aarvold for the defendants. The defendants ask to have the plaintiff's statement of claim struck out either under Ord. 25, r. 4, or under the inherent jurisdiction of the court on the ground that, assuming that the defendants' conduct amounted to a repudiation of the contract, the plaintiff did not accept it as such but has gone on performing his part of the contract. Accordingly, he must be deemed to have affirmed the contract: *Heyman* v. *Darwins Ld.* (1). This is not a case where a declaration should be made under Ord. 25, r. 5 (2). This case is distinguishable from *Société Maritime et Commerciale* v. *Venus Steam Shipping Co. Ld.* (3), and *Spettabile Consorzio Veneziano di Armamento e. Navigazione* v. *Northumberland Shipbuilding Co. Ld.* (4). If a declaration is made, it will not settle the dispute between the parties: the plaintiff will have to bring another action. This statement of claim should be struck out.

Cumming-Bruce for the plaintiff. It is submitted that it is open to the plaintiff to come to the court and ask for a declaration as to his rights. The judge had jurisdiction to refuse to strike out this statement of claim, and, since he exercised his discretion in the matter, it is submitted that there are no grounds for interfering with the way in which he exercised it. It is important that, if a party is in doubt as to his rights under an agreement, it should be open to him to apply under Ord. 25, r. 5, for a declaration as to his rights, before he commits himself to any course of conduct which may prejudice him. Had the plaintiff refused to continue his service with the defendants pending the determination of this action, he might have been held to be in breach of his service agreement. There must be a middle road by which a plaintiff can obtain the directions of the court without losing his employment. A declaration under Ord. 25, r. 5, is a convenient procedure for a plaintiff who does not know his position. It is admitted that, if the plaintiff obtains the declaration he seeks, he will, should he want further

---

(1) [1942] A. C. 356, 361.

(2) R. S. C., Ord. 25, r. 5: " No " action or proceeding shall be open " to objection, on the ground that a " merely declaratory judgment or " order is sought thereby, and the " court may make binding declara- " tions of right whether any conse- " quential relief is or could be " claimed, or not ".

(3) (1904) 9 Com. Cas. 289.

(4) (1919) 121 L. T. 628.

C. A.
1950

HOWARD
v.
PICKFORD
TOOL CO.
LD.

relief, have to take other proceedings: see *Guaranty Trust Co. of New York* v. *Hannay & Co.* (5).

EVERSHED, M.R., stated the facts, and continued:—The question is a brief one, whether a claim for such a declaration as is sought, and in such circumstances as are found here, is within the intendment of Ord. 25, r. 5. The declaration sought is "a "declaration that the conduct of the defendants set forth in "para. 4 hereof is such as to constitute repudiation by the defen"dants of the contract and that the plaintiff is excused further "performance of his obligations under the contract".

I wish to be cautious in what I say, because I do not doubt that Ord. 25, r. 5, confers upon the court most valuable jurisdiction to make declaratory judgments in appropriate cases. A good example of the utility of the Order is to be found in *Société Maritime et Commerciale* v. *Venus Steam Shipping Co. Ld.* (6). There was in that case a written contract of an elaborate character. There had been an assignment by the original contractors of their rights under it, but the real question was whether as a result of certain acts and events the plaintiffs could properly refuse to load a ship which, if the contract were still binding on them, they were bound to do. They declined to load it, and, without waiting for action to be brought against them, brought the proceedings for a declaration that, in all the circumstances of the case, they were entitled so to refuse; and that very learned judge, Channell, J., held that they were so entitled. From that case and the reference to it in the later case to which we have also been referred of *Spettabile Consorzio Veneziano di Armamento e. Navigazione* v. *Northumberland Shipbuilding Co. Ld.* (7) in the Court of Appeal, it may be taken that where a party says that he is no longer bound by a contract he may, in certain circumstances, seek a declaration of the court to that effect; and if the declaration is against him, he will not be taken, by his having merely declined to do some particular thing, to have repudiated the contract.

It is to be observed that this case is fundamentally different in character from those, for this reason: the plaintiff is still performing (it is said) to the best of his ability, his contract; that is to say, at the moment he is still attending at his place of business. It is quite plain (and I refer, if it be necessary to quote authority, to the speech of Lord Simon, L.C., in *Heyman* v. *Darwins Ld.* (8), that if the conduct of one party to a contract amounts to a repudiation, and the other party does not accept it as such but goes on performing his part of the contract and

(5) [1915] 2 K. B. 536.
(6) 9 Com. Cas. 289.
(7) 121 L. T. 628.
(8) [1942] A. C. 356, 361.

affirms the contract, the alleged act of repudiation is wholly nugatory and ineffective in law.

It is to be noted that the plaintiff has alleged that certain actions of the defendants' chairman at some period before the issue of the writ in September constituted a breach of this contract. If the action were to proceed, the court would be asked to say whether those actions in September then amounted to a repudiation which the plaintiff could then have accepted. He did not, however, accept them as a repudiation, and a decision that they might have been accepted would not, so far as I can see, involve the result that they could now be relied upon as such repudiation and that the plaintiff could accept them now and say nunc pro tunc that the contract was at an end. Indeed, Mr. Cumming-Bruce virtually conceded that, if he obtained a favourable declaration, the result would almost inevitably be another action, if not a series of other actions.

Although Ord. 25, r. 5, is most useful in the jurisdiction which it confers, and I am not anxious to put unnecessary limitations upon it, it is plain that it could not, and should not, be used so as to require the court to answer academic questions. In effect that is what would happen here, for, if Mr. Cumming-Bruce is right, it would be possible for a person who alleged that he had been wronged to ask the court to declare in his favour that that was conduct which he could, if he had liked, have accepted as repudiation and which accordingly, if it were repeated, could then be so accepted.

I want to confine my observations strictly to the matter in hand, and I therefore prefer to say no more than that in this particular case, I am satisfied that the court ought not in the circumstances to entertain an action for a declaration of this nature. That is not to say that the plaintiff may not have some other cause of action which he may litigate—that will be for him; because the result of striking out the statement of claim in no sense bars him from any other claim he may rightfully have arising out of the same subject-matter. But this particular claim, with all respect to the judge who took a contrary view, is in my opinion beyond what I have called the intendment of the order, and I think that the action is one which the court could not properly entertain. I would therefore allow the appeal and order that the statement of claim be struck out.

ASQUITH, L.J. I agree. An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind. Therefore a declaration that the defendants had repudiated their contract with the plaintiff would be entirely valueless to the plaintiff if it appeared at the same time, as it must appear in this case, that it was not accepted.

C. A.
1950

HOWARD
v.
PICKFORD
TOOL CO.
LD.

Asquith, L.J.

The plaintiff's having stayed on and continued to perform the contract for something like two months and being still in the act of performing it, seems to me to be a sufficient reason for saying that the remedy asked for is an academic one such as cannot properly be sought under Ord. 25, r. 5. For that reason, with the others given by my Lord, I agree that the appeal ought to be allowed.

SINGLETON, L.J. I also agree, and I would add only this: Mr. Cumming-Bruce submitted to the court that to grant a declaration in the terms sought in this case would be a convenient way of dealing with the matter. I do not think that it would be so: I think that it would be rather inconvenient. At the most it would be making up the plaintiff's mind for him; but that is not the purpose of this procedure under Ord. 25, r. 5. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Biddle, Thorne, Welsford & Barnes, for Wake, Smith & Co., Sheffield; Bell, Brodrick & Gray, for Harry Glass, Sheffield.*

B. A. B.

Reversed on question of damages.
C.A. [1951] 2 All E.R. 191.

Reversed.
[1951] 2 K. B. 314

1950
June 12, 13
14, 15, 16,
19, 20, 21,
22, 23, 26,
27, 28, 29,
30; *July* 3
4, 5, 28.

Devlin, J.

BIGGIN & CO. LD. AND ANOTHER *v.* PERMANITE, LD., BERRY WIGGINS & CO. LD. (THIRD PARTIES).

Damages—Measure of—Sale of goods—Resale—Series of contracts—Foreseeable consequence of breach of contract—Compromise of other proceedings by plaintiffs—Vendor's liability to plaintiffs—Warranties added to successive contracts—Liability of original vendor.

Manufacturers of specialised products from bitumen prepared an adhesive called Permasec for use with roofing felt which was to be capable of being applied cold owing to the scarcity of fuel at that time in Holland where it was to be used. They sold it to roofing contractors who resold it to specialists in roofing materials for supply to the Dutch government, who disposed of it to numerous Dutch roofing contractors. The Permasec was used in the repair of house roofs mainly during the winter of 1945, and in the spring of 1946 it began to "creep" (drip and run). The roofs had to be repaired or renewed and claims were made against the Dutch government. In May, 1946, the Dutch government asked their suppliers, the specialists in roofing materials, to take back 1,400 tons of Permasec unused, but they refused. The Dutch government withheld 55,000*l.* which they owed to their suppliers for roofing felt. They refused to submit to the jurisdiction of the English courts but consented to arbitration in England. The suppliers on the advice of counsel on the day of the commencement of the arbitration settled the claim for 43,000*l.* They brought an action for damages for breach of warranty for this sum against the roofing contractors from whom they had bought it, who brought in the manufacturers of products from bitumen as third parties. Liability was admitted but on the question of damages:—

Held, (1.) since a defendant required to indemnify a plaintiff against his liability to another party was entitled to have the existence and precise extent of that liability proved against him in proceedings to which he was a party, and since the compromise between the plaintiffs and the Dutch government was not a foreseeable consequence of the making of a claim but flowed from the voluntary act of the plaintiffs such compromise was irrelevant to the issue of damages between the plaintiffs and the defendants. Evidence of that settlement was irrelevant and inadmissible, and the claim for the 43,000*l.* as a lump sum failed.

(2.) Since it did not matter how many links there were in the chain, provided what happened at the end of it was within the contemplation of the parties, the damage to property resulting from the use of Permasec by the Dutch contractors was not too remote.

(3.) For the sum recoverable in respect of a breach of the last contract in a chain to be the measure of damages for a similar breach of a contract higher up the chain, the contracts along the chain connecting them must be the same.

(4.) If there was a variation of description such that it was impossible to say whether the injury that ultimately resulted would have flowed from the breach of the original warranty, the parties must be presumed to have put the liability for the injury outside their contemplation as a measure of damages.

In the case of damages consisting of a market loss any variation more than a matter of words would be generally fatal. In the case of physical damage, its nature would show whether the variation was material or not.

(5.) To be able to claim for physical damage, the plaintiffs must show, not that the specifications and implied conditions passed on by the Dutch government corresponded exactly with the specifications of the defendants and the statutory conditions of the Sale of Goods Act, 1893, but that the liabilities of the Dutch government to the contractors arose from the failure of Permasec to behave as warranted by the plaintiffs.

(6.) If physical damage was excluded as the measure of liability owing to a material variation in the contracts, the Dutch government's transactions with contractors must be excluded from consideration, and the measure of damages would ordinarily be the reduction in the market value of Permasec attributable to its defects.

(7.) In respect of physical damage resulting from sales by the

1950

BIGGIN & CO. LD. *v.* PERMANITE. LD. BERRY WIGGINS & CO. LD. (THIRD PARTIES).

Dutch government after it knew of the defects of Permasec, the damages were the physical damage resulting from its use, but owing to the duty of mitigation not exceeding the reduction in market value attributable to those defects.

(8.) Where market value was the measure of damages the absence of precise evidence of it was no ground for awarding nominal damages only. The court must determine the damages as best it could.

ACTION for damages for breach of contract.

The plaintiffs, Biggin & Co., Ld., and Archibald Bathgate (Building Materials), Ld., two associated firms, were requested, in 1945, by the Royal Netherlands Government to supply them with considerable quantities of an adhesive for use with roofing felt. The plaintiffs passed the inquiry to the defendants, for whom the third parties manufactured the required material. The adhesive was resold by the Royal Netherlands Government to various contractors, who, on the material proving unsatisfactory, made claims for compensation against the government. In turn the government claimed from the plaintiffs, who settled the claim by the payment of 43,000*l.* and certain costs. They, the plaintiffs, now claimed damages against the defendants, who claimed to be indemnified by the third parties.

The facts appear in the judgment.

Beyfus, K.C., and *Stenham* for the plaintiffs.

Sir Walter Monckton, K.C., *Karmel, K.C.*, and *Beddington* for the defendants.

Diplock, K.C., *J. C. Leonard*, and *Vick* for the third parties.

Barrowclough held a watching brief on behalf of the Royal Netherlands Government.

Cur. adv. vult.

DEVLIN, J., read the following judgment. This case concerns 2,500 tons of Permasec, a material intended for use as an adhesive in the laying of felt roofs. In 1944 the Royal Netherlands Government (I shall shorten the title by calling it the Dutch government) had to face the prospect of repairing war damage in Holland and providing emergency housing. Through a department in London called N.O.R.R. and in charge of a Mr. Kraayvanger they bought considerable quantities of roofing felt from the plaintiffs, who are two associated companies describing themselves as manufacturers and specialists in roofing materials. They acted in this case through Mr. Robinson, a director, and Mr. Trinder, a sales representative. The plaintiffs had bought a good deal of the felt supplied to the Dutch government from the defendants, who described themselves as roofing contractors and roofing felt manufacturers. Mr. Turney is their

1950

BIGGIN & CO. LD.
v.
PERMANITE, LD.
BERRY WIGGINS & CO. LD.
(THIRD PARTIES).

Devlin, J.

general manager. In February, 1945, the Dutch government asked the plaintiffs to supply an adhesive for use with the felt. In ordinary times this would have been a bituminous adhesive, but in 1945 bitumen was scarce, so that it had to made of fluxed pitch. The Dutch government also wanted it to be an adhesive which could be applied cold because of the shortage of fuel in Holland. The plaintiffs passed the inquiry on to the defendants, and the defendants ordered the material from the third parties, who are manufacturers of specialized products from bitumen ~~and~~ and other similar substances. Mr. Church, the sales manager of the third parties' compound department, arranged the sale, and Mr. Licence, their chief technical adviser, was responsible for the preparation of the compound which he called Tensulac No. 5211, but whose name the defendants, who posed as its manufacturers, changed to Permasec. Deliveries began in April, 1945, f. a. s. Miller's Wharf on the Thames. The Dutch government transported the material to Holland and resold it to numerous Dutch roofing contractors.

The results of the application of Permasec were in many cases unsatisfactory. Most of it was applied in the winter of 1945, and in the warm spring of April, 1946, it began to drip and run—" creep " is the term used in the trade. Outside the buildings it dripped down from the eaves, and it found its way through the roofs and dripped inside the buildings too. The roofs had to be repaired or renewed, and claims were made on the Dutch government. In May, 1946, the government asked the plaintiffs and the defendants to take back 1,400 tons of the material which was unused, but they would not. The government withheld 55,000*l.* which they owed the plaintiffs for roofing felt. The government would not allow themselves to be sued in the English courts, but they agreed to arbitrate in England. In January, 1949, on the day the hearing of the arbitration began, the plaintiffs, on the advice of their counsel, settled the dispute by allowing the government approximately 43,000*l.* for their claim and paying their costs. The plaintiffs now claim from the defendants these sums, together with their own costs of the arbitration, as damages for breach of contract, and the defendants make similar claims against the third parties.

There is no doubt that the Permasec " crept " seriously. In the course of the trial numerous reasons for the " creeping " have been suggested, and they can be grouped under three heads. The first head covers alleged defects in the composition of the material which made it inherently unsuitable for its purpose. The second and third heads cover alleged misuse of the material, that is to say, its use for a purpose or in a manner for which it was not designed. I have divided the second from the third head according to whether the misuse was innocent or culpable.

Under the second head it occurred because the Dutch contractors had not been told, and were not to know, of the peculiarities and limitations of the material. The main question there is to assign the responsibility for the failure to instruct the contractors properly. The third head covers matters of improper workmanship and breaches of the instructions which were given to the contractors. [His Lordship considered the evidence and found that when Permasec was used as a top dressing the cause of the "creeping" was that it was not fit for the purpose, for which it was not designed. When it was used as an adhesive, the cause of the "creeping" was threefold—the low temperature at which the compound softened, its incompatibility with bituminous felt, and the insufficient time allowed for drying before application of the felt, none of the Dutch contractors having allowed the prescribed drying time of thirty to sixty minutes. As regards the contract between the plaintiffs and the defendants, His Lordship found that it was a term thereof that the adhesive should be suitable for use with pitch felt and bituminous felt. The Permasec did not correspond with its description, and, having regard to the impracticability of the long drying time in Holland, the adhesive could probably not be described as an efficient adhesive, and it was certainly not fit for the purpose for which it was required. As between the plaintiffs and the defendants, one or other of the conditions under the Sale of Goods Act, 1893, ss. 13 and 14, had not been fulfilled. As between the defendants and the third parties, there was a sale by description, and His Lordship was satisfied that the material did not comply with the description, and that the defect in the compound was substantial, which was enough to constitute a breach of contract. His Lordship continued:] It is not suggested that the third parties have any responsibility for the incompatibility with bitumen felt, and so the sum of the matter is that neither the defendants nor the third parties are responsible for the failure of Permasec as a top dressing; that in respect of its use as an adhesive the defendants broke their contract with the plaintiffs in respect of all the three factors which contributed to "creeping"; and that the third parties broke their contract with the defendants in respect of one only of the three factors.

I arrive now at the issue of damages, and the first point I have to consider is whether, as between the plaintiffs and the defendants, at any rate, it can be disposed of simply by saying that it is the sum of 43,000*l.* odd which the plaintiffs on the advice of counsel, paid to the Dutch government. In my judgment, the general rule is that a defendant who is required to indemnify a plaintiff against his liability to a third party is entitled to have the existence and precise extent of that liability proved against him in proceedings to which he is a party. That does not mean that a plaintiff may not compromise with his adversary save at the risk of losing his indemnity or at the cost of offering the defendant a choice between the compromise or the proof. A plaintiff acts in such a matter at his own risk and for his own benefit. If he compromises erroneously where there is no liability, he cannot make the defendant pay for his error. If he compromises successfully, he will be that much in pocket. It is true that if the defendant pays him more than the compromise, the plaintiff will be paid more than he has lost. But that is a thing which is bound to happen whenever the nature of the indemnity is precisely defined, and the area of its operation consequently circumscribed, and an event takes place outside that area. One need only take the present case a step further back. If the plaintiffs' sub-sale to the Dutch government was not a matter within the contemplation of the parties, any profit or loss the plaintiffs made on it would be their own. In *James Finlay & Co., Ld.* v. *N. V. Kwik Hoo Tong Handel Maatschappij* (1), where the earlier authorities are cited, Scrutton, L.J., said: "unless the seller contemplates the possibility of a "sub-contract under which a claim may be made on the buyer, "the sub-contract must be disregarded for the purpose either of "increasing or diminishing the damages. This was one of the "many instances in English law where the measure of damage "did not give the real loss suffered by the party".

Of course, an indemnity can be what the parties choose to make it, and any general rule is subject to that. A policy of insurance often indemnifies a man against sums he may be adjudged liable to pay and sometimes against those which he may pay on the advice of competent counsel. (Incidentally, the latter indemnity is usually only to be found in special circumstances where an assured's reputation might suffer from litigation, and then it is expressly stated. It would be curious if an assured without the aid of express words could arrive at the same result by saying that he was entitled to compromise on the advice of counsel anyway.)

To determine the matter in principle, it is therefore necessary to consider the extent of the indemnity which the law grants by way of damages for breach of contract. The indemnity covers all those matters which the defendant as a reasonable man ought to have foreseen might well result from the breach. It is not disputed that the defendant ought to have foreseen a claim by the Dutch government, but the claim, when it comes within the area of the indemnity, does not bring with it as a matter of course all that may appertain to the handling of it.

---

(1) [1929] 1 K. B. 400, 411.

In *Hammond & Co* v. *Bussey* (2) it was not disputed that the plaintiff could recover from the defendant the damages he had paid to a third party, and the question was whether he could recover the costs he had incurred in the unsuccessful defence of the action brought by the third party. The Court of Appeal had to consider whether the probability of such costs having to be incurred was a matter which must have been within the contemplation of the parties, and they held that on the facts of the case it must. I, therefore, have to determine whether the defendan~~ts should~~ have regarded it as a serious possibility that one of the consequences of their breach would be that the plaintiffs would compromise the claim. Was the compromise a foreseeable consequence of the making of the claim? In my judgment, it was not a consequence in the legal sense at all. It flowed from the voluntary act of the plaintiffs.

When a claim is made, the respondent to it is bound to choose between admitting and disputing it. If his choice to dispute it is reasonable, the costs of so doing necessarily flow from the making of the claim. But, having chosen to dispute it, he is not bound to make a further choice between compromising and litigating. It is argued that the plaintiffs were under a duty to mitigate their damages, and were, therefore, not at liberty to reject a reasonable opportunity of compromise. If, it is said, they had continued to fight and more than the 43,000*l.* had been awarded against them, they could not have recovered the excess from the defendants. This is putting the same point in another way, for the test of its validity is the same, namely, whether the compromise was a consequence of the breach.

In *Williams Brothers* v. *Ed. T. Agius, Ld.* (3), Viscount Haldane, L.C., referred to *British Westinghouse Electric and Manufacturing Co., Ld.* v. *Underground Electric Railways Co. of London, Ld.* (4) as showing "that a subsequent transaction, if "it is to be taken into account in mitigating damages, must be "one which arises out of transactions naturally attributable to "the consequence of the breach, and must not be of an independent character"

Apart from this, there is not in my judgment, any duty to mitigate in the manner suggested. A man always has the right to have any liability alleged against him, the existence or extent of which is doubtful, determined according to law, and he cannot be under any duty which impairs that right. Certainly, he can be under no duty to compromise a claim before all the relevant facts have been ascertained. Mr Beyfus conceded that, if an award had been made by the arbitrator after complete investigation of the whole issue, it would be no more than prima facie evidence of the amount recoverable by the plaintiffs. If this is right (and I need not decide whether it is even prima facie evidence), it is hard to see why the opinion of a counsel whom the defendant has not retained, given before the claim has even been precisely formulated, should be conclusive evidence of the amount which the plaintiffs can recover.

---

(2) (1887) 20 Q. B. D. 79.

(3) [1914] A. C. 510, 520.

(4) [1912] A. C. 673.

For these reasons, I hold as a matter of principle that the making of a compromise between the plaintiffs and the Dutch government is irrelevant to the issue of damages between the plaintiffs and the defendants, and I do not feel that I need do more than canvass quite generally a number of practical considerations which were discussed in the course of the argument and which I think would defeat the working of any rule based on the plaintiffs' submission.

It is conceded that counsel's views on the facts and law on which the existence of liability is based are irrelevant, and that that is a matter for the court. Why as a matter of logic are his views on the facts and the law relating to the quantum of liability any different? What happens if the court thinks that nominal damages only have been proved? Is it permissible to investigate the chain of counsel's reasoning to see if it contains any error? Would an incorrect appreciation of the facts be a fatal error, or must it be an error of law? If in the case of a large number of items counsel has erroneously included one, does that invalidate altogether a settlement for a global sum? And so on. The point is not, I think, improved by the alternative submission that the settlement made must be reasonable. If this means that the sum paid must be the reasonable value of the claim when all the material facts are taken into consideration, it can only be that which the court would itself have awarded, and the inquiry is neither shortened nor affected by the advice of counsel. Therefore, it is contended that reasonableness must be judged as at the time of the settlement and on the information then available. This means that instead of weighing the true facts the court would have to weigh only those, however incomplete and erroneous, which were known to counsel. What standard of reasonableness can be applied to that? Whether to snatch boldly at a tempting offer which may not be repeated when all the facts are known or to insist more cautiously on fuller information, whether to fight or to compromise, these are matters governed more by temperament than by reason. The man who buys shares on the stock exchange in the belief that they will go up is acting quite as reasonably as the man who sells the same shares in the belief that they will go down. Moreover, as Sir Walter Monckton pointed out, counsel might have given weight to a number of matters which it would be highly inconvenient to discuss. He might have been influenced by the opinion he had formed of the reliability of witnesses; or, as is likely in the present case, by admissions made in without-prejudice discussions or by other inadmissible matters.

The plaintiffs relied on *Fisher* v. *Val de Travers Asphalte Co.* (5), in which it appears that Denman, J., left it to the jury to determine whether a compromise was reasonable or not. The decision is not binding on me, and, as there was no discussion of the point I have to decide (it does not appear that the relevance of the question was contested), I have not obtained any guidance from it. Accordingly, I rule that the plaintiffs cannot prove their damages by reference to the settlement which they made with the Dutch government and that evidence relating to such a settlement is irrelevant and inadmissible. I must make it clear that no criticism has been made of the counsel and solicitors who unanimously advised the settlement, nor of the wisdom of their advice. At the time the settlement was made, the immediate subject of the arbitration was the question of liability, and the claim for damages had not been formulated. The plaintiffs' counsel thought, rightly if this judgment is correct, that on the issue of liability they would fail. The advantage to their client of seeking to reach a settlement of the whole dispute before liability was admitted or determined is obvious. The advantage of settling for a sum arrived at on a broad estimate rather than by means of the more exact calculation which the law necessarily requires is also from the business point of view obvious and may become even more apparent when I have expressed my views on the way in which in default of agreement the damages must be assessed. I am however concerned, not with the wisdom of the settlement, but only with whether, wise or foolish, it determines the extent of the defendants' liability, and in my opinion it does not. So the claim for 43,000*l.* as a lump sum fails. The statement of claim contains a claim for the costs of the arbitration, both those payable to the Dutch government, which were admitted to be 2,911*l.* and the plaintiffs' own costs of the arbitration as between solicitor and client, which were proved at 3,284*l.* 18*s.* 1*d.* No argument was addressed to me in opposition to these claims, and, in my judgment, they should be allowed.

I have next to consider a measure of damages alternative to the 43,000*l.* which is raised by an amendment to the statement of claim which I permitted at the trial. Under this alternative the plaintiffs claim that they were liable to pay to the Dutch government damages in respect of breach of contract under two heads. The first head, quantified at 49,300*l.* relates to the loss sustained by the Dutch government in respect of 1,400 tons which were not used. The second head, quantified at 52,270*l.* covers the cost of repairs necessitated by the defects in the Permasec. In case it is not quite clear from the form of pleading, I should say that the plaintiffs do not claim more than the 43,000*l.* odd which they paid to the Dutch government. The figures which I have given are designed to show that the plaintiffs' liability was not less than that sum. It has not been contended that this measure of damages is totally incorrect. The defendants were aware that the plaintiffs proposed to supply the material to the Dutch government under the same description as the defendants were supplying it to the plaintiffs. It is, therefore, admitted that the plaintiffs' liability to the Dutch government is the proper basis for the assessment of damages. This covers the first head in principle, but there is considerable dispute on quantum. The second head is disputed both in law and in fact.

---

(5) (1876) 1 C. P. D. 511.

[His Lordship considered the evidence on the question of quantum under the first head and assessed the damages at 5*l.* a ton for 1,350 tons, and dealing with the facts, which were disputed, under the second head said that the plaintiffs were not in a position to prove the terms of the sub-sales by the government to the contractors, whose claims constituted the major part of the damage suffered. If necessary there must be an inquiry. His Lordship found that by September 30, 1945, the Dutch government ought to have known that Permasec was impracticable for ordinary use, and making the necessary allowance of time for notification to the contractors, the use of Permasec with insufficient drying time after October 31, 1945, was attributable to the failure of the Dutch government to take the necessary action. His Lordship continued :] I have said that the second head of the Dutch claim is challenged in law as well as in fact. Some of the points of law arise not only between the plaintiffs and defendants, but also between the defendants and third parties. So in this section of my judgment I shall include where convenient reference to the case against the third parties.

The defendants begin with a submission that this head of damage is on the face of it too remote. I cannot accept that. I think that the defendants must be taken to have known that, if the compound were defective, the Dutch government would sustain damage, for which they would hold the plaintiffs responsible, and that such damage might fall under three heads.

The government might use this material on their own property; they might use it through their own contracting departments or through agents on other people's property and so be liable to pay them compensation; they might sell or distribute it to independent contractors and so become liable to claims from them. It was contended by the defendants that the chain leading from them to the Dutch contractors, particularly since it involved the intervention of a Bathgate-Biggins contract, was too long. I do not think that the application of the principle is to be determined by the number of links in the chain. If what happened at the end was within the contemplation of the parties, I do not think it matters how long the chain is. I respectfully adopt what was said on this point by Branson, J., in *Kasler and Cohen* v. *Slavouski* (6).

I think, therefore, that the plaintiffs can now recover from the defendants that which the government could under these heads properly have recovered from them. I shall call damage under these heads physical damage to distinguish it from the market loss or difference in value which is the ordinary measure. There must be further inquiry into the extent of the physical damage and the nature and amount of the claims which the Dutch government could have made. In order to limit as far as possible the collection by the parties of unnecessary material for the inquiry, I shall express my views on certain points of principle that are likely to arise and on which I have heard argument. I shall not, in matters which cannot be determined until after further inquiry, attempt to lay down the law finally as in a declaratory judgment. That is always difficult to do, and especially in this branch of the law where so much depends on the facts of each case. What I say may, therefore, require modification when the facts are known.

The defendants submit that there are two qualifications to the application of the principle I have adopted. The first is that in claims based upon sub-sales by the Dutch government, the description of the compound and any warranties of quality must be substantially the same in all the contracts in the chain. It is not disputed that the necessary similarity exists in the contracts between the defendants and the plaintiffs, and the plaintiffs and the government respectively. Whether it exists in the contracts between the government and the Dutch contractors cannot be determined until the contracts are produced and, if necessary, the relevant principles of Dutch law ascertained, but it is desirable that I should indicate whether I think the qualification sound, and if so, in what manner it should be applied. The second qualification is that claims arising after the government knew or ought to have known of the defects in the compound should be excluded. On this point I have already found the facts.

---

(6) [1928] 1 K. B. 78, 85.

The first qualification depends on the views expressed by Bankes, Warrington and Scrutton, L.JJ., in *Dexters, Ld.* v. *Hill Crest Oil Co.* (*Bradford*), *Ld.* (7). They were all obiter dicta and Scrutton, L.J., reserved his final opinion, but a unanimous expression of opinion by three Lords Justices carries great weight, and in particular the following passage from the judgment of Scrutton, L.J., is often cited: " Those cases where there has " been a chain of sales and sub-sales often present complications " and difficulties, but one point I have always understood as " clear—namely, that in order to make a sum recovered for " breach of the last contract in the chain the measure of damages " for a similar breach of a contract higher up in the chain, it is " essential that the contracts along the chain connecting them " should be the same. Where, as here, the earlier contracts are " for the sale of goods under one description, and that not an " ordinary trade description, and at some link in the chain the " description varies, and becomes a well known trade description, " I find it difficult to hold that the amount recovered for a breach " of the last contract in the chain can be made the measure of " damages for a breach of the first ".

I respectfully adopt this principle, but I have still to determine how it should be applied in this case, and also what degree of variation in description breaks the chain. Scrutton, L.J., was dealing with a chain of contracts between merchants wherein one might expect the same specification to be used, but a claim for physical damage may be initiated by a person who is not a party to a contract of sale, or, perhaps, to any contract at all—a householder, for example, whose property has been damaged by Permasec. It is not to be expected that a builder, when making a contract for repair work, will recite to the householder and incorporate therein all the specifications and warranties which he may receive from his suppliers in respect of all the different materials which he may use on the job. To understand the application of the principle it is necessary to understand its basis. Like every principle in this branch of the law, it stems from the broad rule that the damage is to be measured by those consequences of the breach which the parties as reasonable men would, if they had thought about it, have foreseen and accepted as natural and probable. If the variation to a description is such that it is impossible to say whether the injury that ultimately results would have flowed from the breach of the original warranty, the parties must as reasonable men be presumed to have put the liability for the injury outside their contemplation as a measure of compensation. If this is, as I believe, the nature of the principle, it must be applied very differently

---

(7) [1926] 1 K. B. 348, 359.

1950

BIGGIN & CO. LD. *v.* PERMANITE, LD. BERRY WIGGINS & CO. LD. (THIRD PARTIES).

Devlin, J.

according to whether the injury for which the defendant is being asked to pay is a market loss or physical damage. In the former case (which I think is what the Lords Justices were considering in *Dexters, Ld.* v. *Hill Crest Oil Co. (Bradford), Ld.* (8)) any variation that is more than a matter of words is likely to be fatal, because there is no way of telling its effect on the market value. In the latter case the nature of the physical damage will show whether the variation was material or not. I may illustrate this by a hypothesis taken from the facts of this case. Suppose that all the Dutch government did in their subsales was to add to the original warranties given to them by the plaintiffs a guarantee that the compound could be used at any time within two years, whereas in fact it was usable only for one year after manufacture. Looked at generally, that is a material addition, but if, in fact, it had been used within one year with injurious results, the additional warranty ought not, I apprehend, to bar the claim. If, however, it were sold with all faults, it would generally be impossible to prove what part of the market loss was due to its known tendency to " creep " and other breaches of the original warranties, and what part to its shorter life in breach of the hypothetical warranty. It seems improbable that the Dutch government will in every case have passed on to the Dutch contractors the specification in the same form as received and even more improbable that any implied condition as to quality that there may be in Dutch law will correspond exactly with the statutory conditions in the Sale of Goods Act, 1893. I do not think that is necessarily fatal. When the terms of each Dutch contract and the nature of the physical damage are known, I think that the test will be whether the Dutch government could show that the whole of its liabilities to the contractor arose from the failure of the compound to behave as warranted by the plaintiffs.

That is as much as I can say on the point as it affects the plaintiffs and the defendants. The third parties' case on the same point is clear. I think that they can successfully invoke the principle. The third parties in effect warrant the material to be good, except for slight " creepage ". The defendants, in effect, pass on the warranty without the exception, and add to it a warranty that the material can be used with bitumen felt and that it needs no unusual or impracticable drying-time. The injury that arises is in two categories—first, repairs have to be done in Holland; secondly, the Dutch government has to dispose of the unused material at a loss. No one can say how far the deficiency in the Permasec which necessitates the repairs is due to the original defect or to the curtailment of the drying-time, or, perhaps, to its incompatibility with bitumen felt. Similarly, even if the difference in value could be ascertained by an actual sale at market price, the lower price would be for the material with all its disadvantages. I hold that the damage sustained by the defendants cannot be measured by their liability to the plaintiffs.

---

(8) [1926] 1 K. B. 348.

I turn now to the second qualification. It is, I think, clear that in this sort of case a plaintiff cannot pass on his liability to an outside party for bad quality if, before the sale to the outside party, he had notice of the defect in quality; see *British Oil and Cake Co., Ld.* v. *Burstall & Co.* (8), per Rowlatt, J., and *G. C. Dobell & Co., Ld.* v. *Barber and Garratt* (9), per Lawrence, L.J. It is not so clear whether and in what circumstances a plaintiff ought to examine the goods himself to ascertain if they are defective, but I need not concern myself with that, for the Dutch government had all the data which, had they been properly assembled, would have shown that the compound required an impracticable drying-time. It would not be in accordance with a plaintiff's duty to mitigate his damage that he should in such circumstances sell without qualification. Similarly, if the knowledge of the defects comes to the plaintiff after the sale to the outside party, and if, by passing on that knowledge to the outside party, he can diminish his liability to that party, he is bound to do so. The result is that on the facts that I have found there may be cases in which the plaintiffs cannot set up as the measure of damage the sum payable to the Dutch contractors. Counsel for the plaintiffs contends that in such cases he can recover as damages the difference in value between the contract price and the figure of 6*l*. a ton (the figure received from a distillery by the government for 1,350 tons). In other words, he seeks to substitute the ordinary measure of depreciation in value. I presume that he would make a similar contention in respect of the compound (if any) sold under a different warranty if the Dutch claims are excluded under the principle in *Dexters, Ld.* v. *Hill Crest Oil Co.* (*Bradford*), *Ld.* (10). A question of principle thus arises whether the ordinary measure remains available, and on that I shall express a view.

Damages which arise under the so-called "second rule" in *Hadley* v. *Baxendale* (11), are sometimes referred to as if they were an increased sum which the plaintiff could obtain if he could show "special circumstances", or as if the rule embodied a measure of damage specially beneficial to the plaintiff which he could invoke if he fulfilled the necessary conditions. It is, no

(8) (1923) 39 T. L. R. 406, 407.
(9) [1931] 1 K. B. 219, 238.
(10) [1926] 1 K. B. 348.
(11) (1854) 9 Ex. 341.

1950

Biggin & Co. Ld. v. Permanite, Ld. Berry Wiggins & Co. Ld. (Third Parties).

Devlin, J.

doubt, true that it generally operates in favour of a plaintiff rather than against him, but I think that it is capable of doing either. I feel, with deference, that the division into two rules of what is in *Hadley* v. *Baxendale* (11) a statement of principle in a single sentence has sometimes proved misleading. The re-statement of the relevant principles in *Victoria Laundry (Windsor), Ld.* v. *Newman Industries, Coulson & Co., Ld. (Third Parties)* (12) makes it clear that there is only one area of indemnity to be explored, and that is what is within the prevision of the defendant as a reasonable man in the light of the knowledge, actual or imputed, which he has at the time of the contract. It has often been held—I have already referred to the authorities—that the profit actually made on a subsale which is outside the contemplation of the parties cannot be used to reduce the damages measured by a notional loss in market value. If, however, a subsale is within the contemplation of the parties, I think that the damages must be assessed by reference to it, whether the plaintiff likes it or not. Suppose that the only fault in the compound was its incompatibility with bitumen felt, the chance that it might produce bad results would certainly reduce its market value before use. But if it is the plaintiff's liability to the ultimate user that is contemplated as the measure of damage and if in fact it is used without injurious results so that no such liability arises, the plaintiff could not claim the difference in market value, and say that the subsale must be disregarded.

I say this so as to make it clear, that although I have come to the conclusion that, if the plaintiffs' basic claim fails, they can to some extent rely on the alternative of difference in market value, it is not because I think the plaintiffs have an option in the matter. The result is brought about in another way. First, if physical damage is excluded as a measure of liability on the principle of *Dexters, Ld.* v. *Hill Crest Oil Co. (Bradford), Ld.* (13), the position is the same as if the whole of the government's transactions with outside parties was excluded. The plaintiffs are, therefore, entitled, and, indeed, compelled, to prove their damage by some other measure, which would ordinarily be difference in value. In the second class of case where the government ought not to have made the subsale, the position is, I think, this. Liability for physical damage remains the criterion of loss. All the parties are to be taken as having accepted it as such, and the government cannot by their unilateral act displace it. The plaintiffs cannot claim any relief in respect of any quantity of compound which has not caused

(11) (1854) 9 Ex. 341.

(12) [1949] 2 K. B. 528.

(13) [1926] 1 K. B. 348.

1950

BIGGIN & CO. LD.
v.
PERMANITE, LD.
BERRY WIGGINS & CO. LD. (THIRD PARTIES).

Devlin, J.

physical damage, and in cases where physical damage has been caused they must meet the criticism that the government ought to have mitigated it. The course they ought to have taken was to sell the compound with all faults for what it would fetch, and the damage would have been the pecuniary loss they would have suffered, i.e., the difference in value. The plaintiffs cannot therefore claim more than that: *Wagstaff* v. *Short-Horn Dairy Co.* (14). But they cannot claim that, if it exceeds the physical damage. It is relevant only as matter of mitigation, and if it is shown that the loss that would have occurred, had the government sold with all faults, would have exceeded the claim for physical damage, they have an answer to the criticism that they should have mitigated, but no more. The liability for physical damage remains the primary measure of liability contemplated by the parties. The result is that in respect of compound sold after September 30, from whose use no physical damage resulted, the plaintiffs can claim nothing: in the case of any quantity from whose use physical damage has resulted, the plaintiffs may obtain (subject to the next point) the cost of making good, etc., or the difference in market value, whichever is the less. The third class of case covers sales made before September 30, where the government after October 31, allowed the continuing use of the compound without warning. The basic measure here is physical damage, but if it can be shown that under Dutch law the claim which the contractor would have had against the government would have been less if the government had given warning, the claim of the government and of the plaintiffs must be diminished accordingly.

The last point of principle to be considered concerns the assessment of the notional value of the unsound Permasec. As between the third parties and the defendants, there is very little to go on. The material was specially compounded for the job, it was passed on by the defendants to the plaintiffs and was never given a fair commercial trial. It is, therefore, very difficult to say what it would have been worth in the defendants' hands if they had known of its inherent defect. Mr. Diplock has submitted that unless the defendants can offer some reasonably precise evidence of the value of the unsound material, they cannot discharge the burden of proving any substantial damage and so must fail to recover anything more than nominal damages. He submits that there is no such evidence in this case. The same point arises between the defendants and the plaintiffs if I reject, as I do, Mr. Beyfus's submission that the unsound value in 1945 can be taken as the figure which the material fetched on the sale by tender in October, 1946.

---

(14) (1884) C. & E. 324.

It seems to me that one can very rarely arrive at an accurate figure of unsound value. Where the breach is non-delivery, there is often a market price which can be quoted, or evidence can be given of the price at which at the relevant date similar goods were changing hands, but there is rarely any market price for damaged goods, since their value depends on the extent of the damage. If the actual damaged goods are sold with all faults, good evidence can be obtained of the difference in value, but such a sale is not always possible, and a claim for substantial damages cannot be limited to goods which have been sold. Moreover, damage may arise from two sources. Suppose that goods are delivered which are inherently defective in breach of the contract of sale and that they are further damaged by negligent handling in breach of the contract of carriage, and that in their damaged condition they fetch 70 per cent. of their sound value. Is the plaintiff to recover nominal damages only because he cannot prove against either defendant what part of the depreciation in value was due to his acts? It is one thing to say, as I have said, that this is the sort of situation which parties in contemplating the measure of damage would be glad to avoid, and it is another thing to say that it is one which must necessarily result in an injured plaintiff obtaining no satisfaction. I think that in such a situation the court is bound to do the best that it can. It is no more difficult to estimate a plaintiff's loss in such circumstances than it is to estimate the loss of earning power caused by physical disablement. The third parties submit that the latter case is entirely different. I do not think the fundamental principle on which damages are awarded for breach of warranty of quality, namely, that it "is the estimated loss "directly and naturally resulting in the ordinary course of events "from the breach of warranty", is any different in principle. It is only that where precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can. In *Chaplin* v. *Hicks* (15), Vaughan Williams, L.J., said: "In the case of a breach of a contract for the "delivery of goods the damages are usually supplied by the fact "of there being a market in which similar goods can be immediately bought, and the difference between the contract price "and the price given for the substituted goods in the open market "is the measure of damages; that rule has been always recognized. Sometimes, however, there is no market for the "particular class of goods; but no one has ever suggested "that, because there is no market, there are no damages. "In such a case the jury must do the best they can, "and it may be that the amount of their verdict will really be a

(15) [1911] 2 K. B. 786, 792, 795.

1950

BIGGIN & Co. LD. v. PERMANITE, LD. BERRY WIGGINS & Co. LD. (THIRD PARTIES).

Devlin J.

"matter of guesswork. But the fact that damages cannot be "assessed with certainty does not relieve the wrong-doer of the "necessity of paying damages for his breach of contract". Fletcher Moulton, L.J., said much the same thing in his judgment.

I do not think it would have assisted me much in this case if hypothetical buyers had been found to say what they might have paid in 1945 for a compound which they never saw and of whose defects they have learnt only at secondhand. It is a common practice in the commercial world to deal with this type of case by way of a price allowance; and claims for damaged goods are constantly met to the satisfaction of both parties by the fixing of an allowance by an adjuster or some person skilled in the trade. I think that that is a method which can legitimately be followed by the court where no more precise method of calculation presents itself; and, indeed, I should be sorry to think that in the commercial court it was thought preferable to award nominal damages rather than to have resort to it.

I have to consider in the first place, therefore, what I think the value of the goods would have been, that is, what they would have fetched in Holland if they had been sold in 1945 with all faults. I do not, as I have already indicated, accept the view that no more than 6*l*. a ton would have been obtained. That was the figure paid in October, 1946, when supplies of the Dutch product were much more plentiful and when, I dare say, the urgency for repairs was not so great as in 1945. The compound's main fault was, I think, the length of drying-time or drying-out time required, but that was a matter which, if known, might well have been taken as part of the bargain. The contractor who did most of the work in Holland, although he was aware to some extent of the defects of the material, was willing to give it a trial and in fact bought a large quantity. The tendency to "creep", if known, might have been guarded against by guttering or by taping. The material if not suitable for the better type of building, might well have been used on outhouses or in temporary repairs where dripping outside was not of the first importance, or it might be used, as it was in fact, mixed with other adhesives. Similarly, its use might be restricted to non-bituminous felt. I dare say that in normal times these defects would render it unmarketable as an adhesive, but these were very abnormal times. Having regard to the very high price which was paid for what was supposed to be sound material, I am satisfied that it would have commanded a respectable price even if sold with its known defects. There were doubtless cases where it was used without any damage, as is shown by the evidence for the defence. The difference in price between its purchase as a sound material by someone who believed in it in

1950

Biggin & Co. Ld. v. Permanite, Ld. Berry Wiggins & Co. Ld. (Third Parties).

Devlin, J.

October, 1946, and its purchase for distillery use was about 50 per cent. I do not take this as more than a very rough guide, but it accords with my view of the sort of discount which the contractors would have demanded and which would have had to be conceded had the true facts been known. I think they might well have paid about half its sound value. I take its sound value to be the average price which it was fetching in the autumn of 1945, namely, 40*l*. a ton, and I assess the depreciation at 20*l*. a ton. This produces, of course, a very different figure from the similar assessment of depreciation in October, 1946. It may be that the depreciation should be calculated on the contract quantity as a whole and at the date of delivery. As I have said, this point has not been taken, and, in any event, I think that what may seem to be a rather arbitrary division into two parcels does produce a just result. If I had assessed the depreciation as at the time of delivery, I could not have put the market price as high as 40*l*. a ton. I should have had to have regard to the fact that that price was obtainable for only a limited quantity and that the total quantity of 2,500 tons was more than the market would have absorbed.

I think that I have now said all that I can usefully say on the quantum of damage between the plaintiffs and the defendants until there has been further inquiry into the Dutch claims.

The case between the defendants and the third parties is simpler. For reasons which I have already made clear, I think that the right measure of damage is such sum as I consider in all the circumstances to represent the depreciation in the value of the material by reason of its tendency to "creep" in high temperatures. I assess this at 15 per cent. of the purchase price, and for the sum so calculated there will, therefore, be judgment for the defendants against the third parties.

Order accordingly.

Solicitors: *Carpenters; Allen & Overy; Cripps, Harries, Hall & Co.; Lovell, White & King.*

L. F. J. McD.

Reversed. H.L. [1951] 2 All E.R. 58

EAST END DWELLINGS CO. LD. *v.* FINSBURY BOROUGH COUNCIL.

C. A.

1950
Oct. 3, 4, 20.

Bucknill, Singleton and Birkett, L.JJ.

[Ref. No. 6122]

Town and country planning—Compulsory acquisition of site by local authority — Compensation — Rent-restricted flats demolished by enemy action—Notice to treat served on landlords before any war damage made good—Cost-of-works payment—Assessment of value of notionally rebuilt flats—Assumption that new tenancies not rent-restricted—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 53, *sub-s.* 1 (*a*).

Section 53, sub-s. 1 (*a*), of the Town and Country Planning Act, 1947, provides that where an interest in land is an interest in a hereditament which has sustained war damage, and any of that damage has not been made good at the date of the notice to treat, then, if the appropriate payment under the War Damage Act, 1943, would be a payment of cost of works, the value of the interest for the purposes of the compensation payable in respect of the compulsory purchase shall be taken to be the value which it would have if the whole of the damage had been made good before the date of the notice to treat.

On June 24, 1944, a block of working-class flats, owned by the claimant company, which were let on tenancies at rents controlled by the Rent Restriction Acts, was demolished by enemy action. On July 28, 1948, before any of the flats had been rebuilt, the local authority, by virtue of a compulsory purchase order made in 1947, served the claimants with notice to treat. On May 9, 1949, the War Damage Commission determined that the appropriate compensation payable in respect of the damage under the War Damage Act, 1943, was a cost-of-works payment.

The official arbitrator, on the assumption that if the whole of the war damage had been made good before the date of the notice to treat, the hereditament would not be subject to rent control, assessed the compensation payable by the authority at 32,000*l.* The value of the property when subject to rent control was agreed at 20,000*l.* Devlin, J., affirmed the award, applying the decision of the Court of Appeal in *Ellis & Sons Amalgamated Properties Ld.* v. *Sisman* [1948] 1 K. B. 653. On appeal by the local authority:—

Held (by Bucknill and Birkett, L.JJ., Singleton, L.J., dissenting) that the intention of s. 53 was to give compensation based not on the value of a supposed actual rebuilding by the owner before the date of the notice to treat, but on the value of the hereditament before the damage occurred; that the purpose of the statute was to compensate the property-owner for his actual loss, and it would be unreasonable to give s. 53 an interpretation which would enable him to make a profit out of the transaction. The compensation payable therefore was the value of the property as it was

C. A.

1950

East End Dwellings Co. Ld. *v.* Finsbury Borough Council.

when subject to rent control. The plain intention of s. 53 should not be affected by the decision in *Ellis & Sons Amalgamated Properties Ld.* v. *Sisman* (supra) which concerned a different legal result of a similar set of facts.

Per Singleton, L.J. (dissenting). Section 53, sub-s. 1, did not provide that the value was to be that which the hereditament would have had if it had never suffered damage at all. In view of the decision in *Sisman's* case (supra), on the strict wording of the sub-section compensation fell to be assessed on the basis of the assumption made by the official arbitrator.

Appeal from Devlin, J. (1).

The claimants, East End Dwellings Co. Ld., were the freeholders of certain land within the borough of Finchley, and the owners of buildings on it known as Winton Houses. These were working-class flats which by reason of their rateable value were let on statutory or contractual tenancies at rents controlled by the Rent Restriction Acts, 1920–1939. On June 24, 1944, Winton Houses were completely demolished by enemy action. On May 9, 1949, the War Damage Commission determined that the appropriate compensation payable under the War Damage Act, 1943, was an amount "equal to the proper cost of the works "executed for the making good thereof"; but on July 28, 1948, before any of the damage had been made good, Finsbury Borough Council, as the town-planning authority, had, by virtue of a compulsory purchase order made in 1947, served the company with a notice to treat.

The official arbitrator, on the assumption that, if the whole of the war damage had been made good before the date of the notice to treat, the rents legally chargeable in respect of the rebuilt flats would not be subject to the statutory limits imposed by the Rent Restriction Acts, assessed the compensation payable by the corporation at 32,000*l*. The value of the flats before the war damage occurred, when subject to rent control, was agreed at 20,000*l*.

On a special case stated by the arbitrator, Devlin, J., upheld the award. He said that if the company had rebuilt the flats by means of a cost-of-works payment under the War Damage Act, 1943, or out of their own resources, they would not have been required to let them at the 1939 standard rents. The decision of the Court of Appeal in *Ellis & Sons Amalgamated Properties Ld.* v. *Sisman* (2) exactly covered that situation. The new flats notionally erected in place of the old ones, although closely resembling them, would nevertheless be different flats, so that no tenant would have had the right to say that his statutory tenancy continued in the reconstructed flats. The judge

(1) [1950] W. N. 285.

(2) [1948] 1 K. B. 653.

considered that the arbitrator had proceeded on the correct assumption and that there was no error of law in the award. He did not accept the view, argued by counsel for the corporation, that the words "making good" in s. 53 of the Town and Country Planning Act, 1947 (3), were consistent only with the idea that a building which was made good retained its identity.

The borough council appealed.

Geoffrey Lawrence, K.C., for the borough council.
Rowe, K.C., and *Squibb* for the claimant company.

The arguments of counsel sufficiently appear in the judgments.

Cur. adv. vult.

October 20. The following judgments were read:—

Bucknill, L.J. [after stating the facts]. As I see it, the question in dispute turns almost entirely on the proper interpretation of s. 53, sub-s. 1, of the Town and Country Planning Act, 1947. The critical words in the sub-section are "the value "which it [the interest in land] would have if the whole of the "damage had been made good before the date of the notice "to treat".

Devlin, J., based his decision on the ground that if the whole of the damage had been made good new dwelling houses would have been built similar to those which had been demolished. On the authority of the decision of the Court of Appeal in *Ellis & Sons Amalgamated Properties Ld.* v. *Sisman* (4), these new buildings would be free from the rental limits which had attached to their predecessors, the demolished buildings. Therefore the landlord, in all probability, could have let the new buildings at a higher rent than the standard rents of the demolished buildings, and to that extent the value of the new buildings, which is determined mainly by their rent-earning capacity, would have been more than if the old restrictions as to rent had attached to them.

---

(3) Town and Country Planning Act, 1947, s. 53, sub-s. 1: "Where "an interest in land the value of "which is to be ascertained in "accordance with the provisions of "s. 51 of this Act is an interest or "hereditament which has sustained "war damage, and any of that "damage has not been made good at "the date of the notice to treat, then "if the appropriate payment under "the War Damage Act, 1943, would "apart from the compulsory pur- "chase . . . be a payment of costs "of works, (*a*) the value of the interest "for the purposes of the compensa- "tion payable in respect of the com- "pulsory purchase shall . . . be taken "to be the value which it would have "if the whole of the damage had "been made good before the date of "the notice to treat".

(4) [1948] 1 K. B. 653.

C. A.

1950

East End Dwellings Co. Ld. v. Finsbury Borough Council.

Bucknill, L.J.

Mr. Geoffrey Lawrence, on behalf of the Finsbury Corporation, argued that this basis of assessment was wrong, because the words "made good", which were used in s. 53, show that the intention of Parliament was that the old building should retain its identity after it had been repaired or reinstated. In other words, the dwelling must be considered as rising from its ashes, and its identity should be preserved by keeping its old standard rent. I think that the problem is difficult to answer. The decision of the Court of Appeal in *Sisman's* case (5) was given in December, 1947, four months after the Act of 1947 had received the Royal Assent, and I doubt whether s. 53, sub-s. 1 (*a*) was intended to deal with the problem as to what meaning the words "made good" were to have in the case of a demolished house of which a replica is made on a cost-of-works basis. We have, therefore, to apply the words of the section as best we can, being guided by the natural meaning of the words, and at the same time not giving to them a meaning which would be plainly unreasonable and contrary to the general spirit of the appropriate legislation.

I think that the strongest argument on behalf of the claimants was that the statute enacts that the compensation is to be ascertained in accordance with the provisions of s. 51. These are the relevant words of s. 51: "(1.) Any compensation payable "in respect of the compulsory acquisition of an interest in land "by a local or public authority within the meaning of the "Acquisition of Land (Assessment of Compensation) Act, 1919, "in pursuance of a notice to treat . . . shall be assessed in "accordance with the provisions of that Act as modified by the "provisions of this and the three following next sections".

Therefore it is necessary to look at the Act of 1919 to see what those provisions were. Section 2 of that Act enacts that: "In assessing compensation an official arbitrator shall act in "accordance with the following rules: (2.) The value of "land shall subject as hereinafter provided be taken to be the "amount which the land if sold in the open market by a willing "seller might be expected to realize . . .".

Mr. Rowe, on behalf of the claimants, argued that this test must be applied when interpreting the words "the value of the "interest" in s. 53 of the Act of 1947. What, then, he asked, would have been the market value of the land if the whole of the damage had been made good before the date of the notice to treat in 1948? On the authority of *Ellis & Sons Amalgamated Properties Ld.* v. *Sisman* (5), it clearly would have been the value of the dwelling which was not already fettered by a standard rent.

---

(5) [1948] 1 K. B. 653.

In *Sisman's* case (5), the material facts were that a house within the Rent Restriction Acts was so extensively damaged by enemy action in 1941 that it was demolished by the local authority. The defendant was the tenant of the house, and after the damage had occurred he ceased paying rent. After the war the landlords proceeded to erect on the site another house similar in all respects to that which had been demolished. Before it was completed or fit for habitation they terminated the contractual tenancy of the tenant by notice to quit. They then started an action in which they claimed declarations to the effect that the tenant had no rights in respect of the new building. The tenant resisted this claim and claimed a statutory tenancy in respect of it on determination of his contractual tenancy. The Court of Appeal (Tucker, Cohen and Jenkins, L.JJ.) held that the tenant could not claim the protection of the Rent Acts in respect of the plot of land on which the house stood. The house had been destroyed, and with its destruction had gone the rights of the tenant in it under the Rent Restriction Acts.

Tucker, L.J., in the course of his judgment said (6): "on "the undisputed facts it is impossible to say that the house in "the course of erection was the same house as that which had "been damaged by enemy action. It quite clearly was not. "The original house had been pulled down and ceased to exist, "and an entirely new, though no doubt similar, house was in the "course of erection . . . on the undisputed facts in this case "the original dwelling-house had quite clearly ceased to exist "altogether". Later the Lord Justice said (7): "Thus, the original "house having ceased to exist, and the tenant not being entitled "to claim that the protection of the Acts had throughout attached "to the plot of land, he has also failed in his contention that "the building in the course of erection on these premises was "at the material date a dwelling-house let as a separate dwelling. "That being so, it seems to me that, however unfortunate it "may be for him, he has no claim to occupy these premises "now or at any future time".

Mr. Rowe argued that this decision applied to the present case; that since the old dwelling had been "completely "demolished", the new notional dwelling, which ex hypothesi had taken its place before the notice to treat was given, would be free from the restriction of the old standard rents, and to that extent the dwelling, being a free house and not a rent-controlled house, would naturally command a higher value in the market because it would have a higher rent-earning capacity. Devlin, J., accepted this argument. The learned judge in his judgment said "that all the dwellings were, by reason of their rateable values,

---

(5) [1948] 1 K. B. 653. (6) Ibid. 665. (7) Ibid. 668.

"subject to the provisions of the Rent Restriction Acts and were "therefore let at rents which did not exceed the standard rents". He continued: "That being the position, the claimants, as the "owners of the building, if they had rebuilt the premises by "means of a cost of works payment under the War Damage Act, "or otherwise out of their own resources, if one can conceive of "such a step, they would not, as I understand the law, have "been required to let the flats so rebuilt at the 1939 standard "rents".

Mr. Geoffrey Lawrence, on the other hand, argued that the decision in *Ellis & Sons Amalgamated Properties Ld.* v. *Sisman* (8) had no bearing on the proper meaning to be given to the words in s. 53, and that the words "as if the damage had "been made good" postulate the continued existence of the old building. It is unreasonable, he argued, to talk about "making "good" something which has been completely demolished. In the case of a ship sunk in mid-ocean by enemy action, would any reasonable person, he asked, talk of "making good the damage "to the ship"? On the other hand, in the case of a demolished building it was not unreasonable to consider it as continuing to exist in a sense, because the foundations at any rate would remain, and its location fixed.

After anxious reflection on the point, in the course of which my opinion has leaned towards one side and then towards the other, I think that the argument of the corporation is right, and that what seems to me to be the plain intention of s. 53 should not be affected by the decision in *Sisman's* case (8), which was dealing with a different legal result of a similar set of facts.

It seems to me that the cardinal principle of the War Damage Act, 1943, was to compensate the loser by war damage for what he has actually lost; to give him no more and no less. Whether he receives what is called in the Act a cost of works payment, or what is called in the Act a value payment, this principle is applicable in every case. If the War Damage Commission had decided that the compensation to the owner was to be met by a value payment, he would, I think, clearly have received compensation on the basis that the value of his property was already controlled by a standard rent. A value payment is defined by s. 6 as being a payment of an amount determined by reference to the depreciation in the value of the hereditament caused by the damage, as provided by s. 10. By s. 10 the amount of a value payment is to be an amount equal to the amount of the depreciation in the value of the hereditament caused by the damage, that is, the amount by which the value of the dwelling in the state in

(8) [1948] 1 K. B. 653.

which it was immediately after the damage is less than its value in the state in which it was immediately before the damage.

Clearly, therefore, if the War Damage Commission had decided that compensation was to be based on a value payment the value of the hereditament would be affected by the limitation on its rent-earning capacity, and I do not see why this factor should not also operate if the commission determines that compensation shall be on a cost of works basis. This cardinal principle seems to emerge clearly from a perusal of ss. 7 and 8 of the War Damage Act, 1943. Section 7 declares in effect that the question whether a payment under the Act is to be a payment of cost of works or a value payment is to be determined as follows: The payment shall be a payment of cost of works unless the war damage involves total loss. War damage is deemed to involve total loss only if the cost of reinstating the building in the form in which it existed immediately before the occurrence of the damage would be likely to be more than the difference between its market value after its reinstatement and its market value with the damage not made good. Again, the effect of s. 8 is that war damage is to be made good by reinstating the building in the form in which it existed immediately before the damage, and the amount of the payment is to equal the proper cost of the works executed for the making good the damage.

Section 14 of the War Damage Act, 1943, concerns partially damaged land which has been acquired compulsorily, and enacts that "where the appropriate payment in respect of war "damage to a hereditament would, apart from this provision, "be a payment of cost of works, if land . . . is acquired com-"pulsorily, then the commission shall make a payment of cost "of works in respect of the damage so far as made good before "the date of the acquisition and, in respect of the damage not "made good, a value payment". This section was not repealed by the Town and Country Planning Act, and the words of s. 53, which we have to consider must, I think, be interpreted with s. 14 of the Act of 1943 in mind. Reading these two sections together it appears to me reasonably clear that in all cases where a house has received war damage, whether it has been totally demolished or not, the basis for the compensation is to be the value of the house as it was immediately before the damage was done. I do not think the fair reading of s. 53 of the Act of 1947, coupled with s. 14 of the Act of 1943, is that an entirely new and, so to speak, "free" house is to be valued, but the value is to be that of the original house as it stood before the war damage.

The alternative interpretation adopted by the arbitrator appears to me to lead to at least two results, neither of which, I venture to think, Parliament intended when passing these Acts. (1.) The owners of a house which is partially damaged and then compulsorily acquired will receive compensation on the value of that house with the whole of its damage made good, but, nevertheless, still with its rental value controlled by its standard rent fixed under the Rent Acts. On the other hand, if the house is completely demolished the owner will receive his compensation on the basis that the notional repairs done to "make good" the damage, and to reinstate the house as before, has produced a house which is free from the control of the Rent Restriction Acts, and, therefore, more valuable than the damaged house when reinstated. This seems to be unreasonable, and one should not impose an unreasonable interpretation on the words of a statute, unless forced to do so because there is no other possible and reasonable interpretation. (2.) The second objection which I see to the interpretation put upon the section by the arbitrator is that it tends to defeat the salutary object of the Rent Restriction Acts, which is to restrict the increase of rents of small dwelling-houses. Such an interpretation would have this result, if in a thickly populated area such as Dockland (an attractive target for enemy bombs) one might very well have hundreds of small houses demolished, and when reinstated their successors would be no longer controlled by the standard rents of their immediate predecessors. To that extent, in that area, the main object of the Rent Restriction Acts would be stultified.

It may be said that these effects will result if the owner were voluntarily to rebuild his house after being damaged to such an extent as to make it necessary to do so, and to construct what was in effect a new house. Under the authority of *Ellis & Sons Amalgamated Properties Ld.* v. *Sisman* (8) he will then, presumably, be entitled to claim a rent not limited by the standard rent of the old house. That may be so, but I do not think that the point which we have to decide was considered at all by the Court of Appeal in *Sisman's* case (8). The sole question which we have to decide is the amount which the State has to pay for the acquisition of land. Whilst I sympathize with the owner who is deprived of his property by enemy action and think it fair that the State should compensate him for his loss, I do not see why he should make a profit out of the transaction, at the expense of the State. The houses were worth 20,000*l.* before the bomb fell. I think the owner should receive as compensation 20,000*l.*, not 32,000*l.*

I am therefore of opinion in this difficult and important case that the appeal should be allowed and the case remitted to the arbitrator for further consideration.

Singleton, L.J. Compensation for the land acquired by the corporation, the acquiring authority, under the Finsbury (Killick

(8) [1948] 1 K. B. 653.

Street) Compulsory Purchase Order, 1947, is to be assessed as at the date of the notice to treat, namely, July 28, 1948. At that date there were no buildings on the land. Some form of bomb damage, occurring on June 24, 1944, had resulted in the complete demolition of the dwelling-houses which had been known as Winton Houses, and which, with the land, had belonged to the claimants. There had been fifty-five separately let dwelling-houses, and they were subject to the provisions of the Rent Restriction Acts, 1920–1939. Forty-two of the tenancies were statutory tenancies and thirteen were contractual tenancies. No notice to quit had been served on any of the tenants after the demolition of the premises; indeed it may be said that the claimants contemplated re-housing them, or some of them, in the event of their rebuilding the premises. It was not suggested in argument that this affects the legal position.

The principles on which compensation is to be assessed are to be found in ss. 51 and 53 of the Town and Country Planning Act, 1947. The former section provides that in a case such as the present compensation is to be assessed in accordance with the provisions of the Acquisition of Land Act, 1919, as modified by ss. 52, 53 and 54 of the Act of 1947. By s. 2, sub-s. 2, of the Act of 1919 the value of the land is to be taken as the amount which the land, if sold in the open market by a willing seller, might be expected to realize. Section 53 of the Act of 1947 concerns compensation to be paid in the case of a hereditament which has sustained war damage (any of which has not been made good at the date of the notice to treat) if the appropriate payment under the War Damage Act, 1943, would, apart from the compulsory purchase or apart from any direction given by the Treasury under s. 20, sub-s. 2 (*b*), of that Act, be a payment of cost of works. This case falls under s. 53. Apart from the compulsory purchase order the appropriate payment under the War Damage Act, 1943, in respect of war damage would, by virtue of a determination of the War Damage Commission, dated May 9, 1949, be a payment of cost of works. None of the war damage had been made good at the date of the notice to treat. In the events which have happened the cost of works payment becomes a value payment and is payable to the acquiring authority (s. 14 of the War Damage Act, 1943). Thus, under s. 53, sub-s. 1 (*a*), of the Act of 1947 the value of the interest for the purposes of the compensation payable in respect of the compulsory purchase is to be taken to be the value which it would have if the whole of the damage had been made good before the date of the notice to treat.

If there had not been any bomb damage and the council had taken the necessary steps to acquire the land and the dwelling-houses upon it, compensation would have been assessed on the basis that the rents of the dwelling-houses were controlled, for that was a factor by which a willing seller (and a prospective purchaser) would have been influenced. The question which arises in the present case is whether the compensation is to be assessed on the basis that the rents are subject to the control of the Rent Acts or not. It is obvious that if the basis is freedom from control of the Acts the claimants will receive a much higher figure than they would get otherwise: the comparative figures are 32,000*l.* and 20,000*l.*

The official arbitrator awarded the claimants the sum of 32,000*l.*, on the assumption that if the whole of the war damage had been made good before the date of the notice to treat the rents legally recoverable in respect of the dwellings would not be subject to the statutory limits imposed by the Rent Restriction Acts. Devlin, J., upheld the award of the arbitrator, and in this appeal it is sought by the acquiring authority to reverse his judgment and to have it declared that the award is bad in law by reason of the assumption which the official arbitrator made on the question as to control of rents. It is said, and said with force, that it cannot be right that the owners of the property should be paid by the acquiring authority 12,000*l.* more than they would have received if the bomb or bombs had not fallen upon it. The position is not quite so extraordinary as it sounds at first, if it be right to say (a) that if the claimants had obtained a cost of works payment and rebuilt the houses they would be free from control under the Rent Restriction Acts (though, of course, rebuilding takes time), and (b) that if the rebuilding is done by the acquiring authority they will have a property free from control of the Acts and thus of greater value than would have been the case if there had been no war damage.

The Act of 1947 received the Royal Assent on August 6, 1947. On December 12, 1947, judgment was given in the Court of Appeal in *Ellis & Sons Amalgamated Properties Ld.* v. *Sisman* (8), and on the decision in that case Devlin, J., based his judgment. Though other points were raised, the basis of the decision in *Sisman's* case (8) was that the house had ceased to exist and the tenant was not entitled to claim that the protection of the Rent Acts attached to the plot of land on which the house formerly stood. Equally, in the present case, the dwelling-houses which constituted Winton Houses were completely demolished in June, 1944. As I read the judgments of Tucker and Cohen, L.JJ., in *Sisman's* case (8), none of those who had been tenants could at any time after the demolition of the property establish a claim to occupy any part of the premises, for each of the dwelling-houses had ceased to exist. At the date of the notice to treat no one could establish such a claim.

(8) [1948] 1 K. B. 653.

Turning again to s. 53, sub-s. 1 (*a*), of the Act of 1947, compensation is to be assessed according to the value which the interest of the claimants would have if the whole of the damage had been made good the day before the date of the notice to treat. The notional making good seems to me to cover a case in which there had been complete destruction or demolition, and the only point appears to be whether, as one has to imagine that the damage has been made good, one ought also to consider it as made good subject to the control as to rents which attached to the hereditament before it suffered war damage. I do not see my way to read this into the section. No doubt the point was not present to the minds of the framers of the section or it might well have been covered. It is not for the court to re-write the section or to insert into it words which it thinks ought to be there, or which might have been there if this point had been considered by Parliament. The section pre-supposes damage (which may entail demolition), and at some time thereafter a notional making good of that damage. It does not provide, as it might have done, that the value of the interest is to be that which it would have had if the hereditament had never suffered war damage at all. It seems to me that in view of the decision in *Sisman's* case (8) the claimants are right on the strict wording of the section, and compensation falls to be assessed on the basis of the assumption made by the official arbitrator.

For these reasons, I am of the opinion that the judgment of Devlin, J., is right, and that the appeal should be dismissed.

Birkett, L.J. [repeated the facts, and continued]:—It appears to have been agreed between the claimants and the acquiring authority that if the official arbitrator should value and assess the compensation to be paid on a certain basis, the sum to be paid should be 20,000*l.*; and if he should assess it on another basis the sum should be 32,000*l.* The decision of the official arbitrator was that the sum should be 32,000*l.*, and Devlin, J., upheld that decision. The question at issue before Devlin, J., and before this court, is whether the official arbitrator in making his award of 32,000*l.* was wrong in law in basing his assessment on an assumption that he was not entitled in law to make.

The assumption appears in para. 1 of the award and reads: "I assess the compensation payable in respect of the said land, "on the assumption that, if the whole of the war damage had "been made good before the date of the said notice to treat, the "rents legally recoverable in respect of the said dwellings would "not be subject to the statutory limits imposed by the Rent and "Mortgage Interest Restriction Acts, 1920–1939, at the sum of

---

(8) [1948] 1 K. B. 653.

"32,000*l.*". This court is not concerned with the figures. If the official arbitrator was entitled to make the assumption which he did, it is agreed that his figure is correct; if he was not so entitled then the figure is to be 20,000*l.*

The question turns on the construction of s. 53 of the Town and Country Planning Act of 1947, but the provisions of the War Damage Act of 1943 must also be considered. It is important to be remembered that the question before the official arbitrator was not the assessment of war damage but the assessment of compensation for war damage. The official arbitrator found that the houses owned by the claimants had been completely demolished. It is clear from the decision of the Court of Appeal in *Ellis & Sons Amalgamated Properties Ld.* v. *Sisman* (8) that if and when new buildings were erected to replace the old buildings formerly on the site no previous statutory tenant would be able to say that his statutory tenancy continued in the newly erected building, and accordingly the Rent Acts would not apply. It is true that the provisions of the Landlord and Tenant (Rent Control) Act of 1949 might apply, but in any event the rents the landlord could obtain would be higher than the rents obtainable in 1939.

The War Damage Act, 1943, must first be considered, and particularly ss. 6, 8, 10, 13 and 14; but, in view of the earlier judgments, I need not recite them. Section 53 of the Act of 1947 is the governing provision; and by sub-s. 1 (*a*), "The value "of the interest for the purposes of the compensation payable "in respect of the compulsory purchase shall . . . be taken to "be the value which it would have if the whole of the damage "had been made good before the date of the notice to treat". In the present case (1.) there had been war damage suffered; (2.) none of the damage had been made good at the date of the notice to treat; (3.) the appropriate payment under the War Damage Act of 1943 was a cost of works payment.

Accordingly, by the combined effect of s. 14 of the Act of 1943 and s. 53 of the Act of 1947, the cost of works payment is converted into a value payment and goes to the acquiring authority, and the land is to be valued on the footing that the war damage had been made good before the date of the notice to treat.

There are obviously two views which can be taken on the construction of the section. One is the view taken by the official arbitrator and the learned judge that you should regard the damage as having *actually* been made good at the date of the notice to treat, and that you should assess the compensation on that basis. That means in the present case that a property is in being at the date of the notice to treat to which the decision in *Sisman's*

(8) [1948] 1 K. B. 653.

case (8) applies, and, therefore, the rents to be obtained are not subject to the previously existing statutory limits. The other view is that what the statute contemplates is not an *actual* making good of the damage suffered but a *notional* making good of the damaged property before the date of the notice to treat as the basis of the compensation. The words " shall be taken to " be the value " support the view that what is being done is to assume that the damaged property has been made good, so that as far as possible the actual damage suffered no longer exists. In other words, the section contemplates a state of affairs in which the claimant is put back into the position in which he was before the damage occurred.

All forms of damage are within the section, whether the damage be slight or severe or, as in the present case, a total demolition. In the case of slight damage to a dwelling-house " the whole of the damage had been made good " would mean that the house was now as it was before the war damage occurred; and I think that the interpretation of these words is the same whatever the extent of the damage. I cannot think that it was the intention of Parliament, nor indeed is it a state of affairs that one could view with any approval, that an owner should be placed in a better position so far as compensation is concerned if his house is wholly destroyed than he would be if his house suffered slighter damage. The *principle* upon which compensation is assessed must remain the same in both cases however much the amounts may differ. I think that the words of the statute " shall be taken to be the value which it would have " if the whole of the damage had been made good before the " date of the notice to treat " mean that the basis of the compensation in cases of war damage of this kind is to be the value of the property before the injury or damage was suffered.

The decision in *Sisman's* case (8) in my opinion, is irrelevant to the question this court has to decide. In my view s. 53 concerns a notional and not the *actual* state of affairs. The judge, with the greatest respect to him, fell into error when he based his decision on a supposed *actual* rebuilding by the owner before the date of the notice to treat, and then felt bound to follow the decision of the Court of Appeal in *Sisman's* case (8) and apply it to the newly-constructed building he had postulated. Part V of the Town and Country Planning Act, 1947, provides a code of compensation, and s. 53 is a part of that code and deals with all cases whatever the extent of the damage where compensation is to be based on a cost of works payment. The words " if the whole of the damage had been " made good ", in my opinion, mean a restoration to the state

---

(8) [1948] 1 K. B. 653.

C. A.
1950

EAST END DWELLINGS CO. LD. v. FINSBURY BOROUGH COUNCIL.

Birkett, L.J.

existing before the damage was suffered. When you "make "good" you wipe out the damage suffered, and the property is to be valued as though the original property was in existence at the date of the notice to treat with all the damage made good, and as though the property was in being as it was before the bomb fell. The careful argument of Mr. Michael Rowe, based on considerations arising from the words of s. 51 of the Act of 1947 and ss. 10, 13 and 14 of the Act of 1943, cannot, I think, affect the true construction of s. 53 of the Act of 1947.

I am of opinion that the official arbitrator was wrong in law in making the assumption stated in the award, and I think the judge was wrong is sustaining it. In my opinion the appeal should be allowed and the matter referred back to the official arbitrator to decide the value of the compensation, leaving out of account the assumption on which his original award was based.

Appeal allowed
Leave to appeal to House of Lords.

Solicitors: *John E. Fishwick, The Town Clerk, Finsbury; George C. Carter & Co.*

A. W. G.

C. A.

BURNS *v.* JOSEPH TERRY & SONS LD.

1950
Oct. 4, 9; 27.

Somervell, Cohen and Denning, L.JJ.

Factory—Transmission machinery—"Securely fenced"—Meaning—Test of foreseeability—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 13, *sub-s.* 1.

The test to be applied on the issue whether transmission machinery is "securely fenced", within the meaning of s. 13, sub-s. 1, of the Factories Act, 1937, is that the obligation on the occupier is to keep this machinery fenced against any events which he can reasonably foresee. If the legislature had intended that the occupier must fence against what he could not reasonably foresee, they would have provided that all transmission machinery must be completely encased (cf. s. 17, sub-s. 1, of the Act). This test of foreseeability is the same as that to be applied in considering whether a part of machinery is dangerous within the meaning of s. 14, sub-s. 1, of the Act: see *Smithwick* v. *National Coal Board* [1950] 2 K. B. 335.

So *Held*, by Somervell and Cohen, L.JJ., Denning, L.J., dissenting.

Decision of Hilbery, J., affirmed.

Per Denning, L.J. To "fence" means to create a barricade to prevent any person employed or working on the premises from making contact with the machinery; and a machine is securely fenced if the barricade is such as to prevent any such person from moving into contact with the machine. The exception to the provision in the sub-section that transmission machinery must be "securely fenced" is "unless it is in such a position or of such "construction as to be as safe to every person employed or working "on the premises as it would be if securely fenced". In considering the exception, the court must make a comparison between machinery which is unfenced and that which is "securely fenced". The test in applying the exception is foreseeability, and no comparison would be possible if foreseeability were the test both of what is "securely "fenced" and also of what is "as safe as it would be if securely "fenced".

Appeal from Hilbery, J.

The plaintiff, a youth of seventeen years, was employed by the defendant company at a machine for cleaning chocolate beans at their factory. His everyday duties were to keep the floor round the machine clean and in the process to collect any beans which had been spilled in the course of operating the machine; to wheel sacks of beans to a hole and shoot them into it; and to steady a ladder by standing at the foot when the charge-hand required to go up the ladder. He was told to keep clear of the machine when it was in motion, and he understood this. On Friday afternoons when the machine would be stopped, he assisted in the cleaning, and, inter alia, went up a ladder and collected any beans that had been spilt over on to a shelf 7 feet 8 inches above the floor.

At the back of the machine, was a cogged rotating pulley wheel 26 inches in diameter. A horizontal rotating shaft crossed the front of the wheel, parallel to its horizontal diameter, and the shaft engaged the wheel by a pinion 5½ inches in diameter at the side of the wheel. The wheel turned at some eighteen revolutions a minute. In front of the wheel and shaft and pinion was a circular wire mesh: this mesh cleared the pinion, but by how much was not proved. The wire mesh barricaded the wheel from a frontal approach but not from the flanks, and there was no circular return guard going round behind the wheel from the top edge of the front circular mesh. There was a rail about 4 feet high round the flooring below and immediately outside the machinery. The rotating shaft was 5 feet 10½ inches high and one-half the diameter of the wheel was 13 inches, so that the shelf, which was some 7 feet 8 inches high, was about 8½ inches above the top of the wheel.

The plaintiff had had impressed on him the importance of sweeping up beans before they were damaged. He had noticed that some of the beans fell from the shelf. When no one was about, on a Friday morning, the plaintiff took a ladder and leaned it up against another higher rotating shaft which was at the top of the machine above the shelf. With no one to steady the ladder, the plaintiff climbed up it to collect any beans there might be on the shelf. The ladder, owing to its being supported by a rotating shaft, started to slip sideways. The plaintiff must have put out his hand to try and clutch something, and got hold of the cogged pulley wheel over and behind the mesh, and the moving wheel took his hand downwards till it came between the pulley wheel and the pinion. The machine, with the mesh, had been there, without any accident, for over twenty years, and no complaint had been made by factory inspectors who had seen it from time to time.

By his action, the plaintiff alleged that his injuries were due to the defendants' breach of statutory duty contained in s. 13, sub-s. 1, of the Factories Act, 1937 (1).

Hilbery, J., on the basis that this was "transmission "machinery", applied the test of reasonable foreseeability: was the machinery securely fenced, having regard to circumstances which could reasonably be foreseen? He held that it was securely fenced and that there was therefore no breach of statutory duty on the part of the defendants. Alternatively, he held that there was contributory negligence on the part of the plaintiff and that he was almost wholly—90 per cent.—to blame for his injury.

The plaintiff appealed.

Hylton-Foster, K.C., and *Denis H. Robson* for the plaintiff. The words "securely fenced" in sub-s. 1 of s. 13 of the Factories Act, 1937, mean that the transmission machinery must be fenced as securely as possible; there must be complete safety; that is to say, the position must be as safe as fencing can make it. The machinery must be so fenced as to prevent any accident to any person employed or working at the factory, however improbable and unforeseeable the circumstances in which the accident happens. There is no case in the books which, on its facts, so decides; but that is the effect of judicial observations made from the bench. The first meaning of the word "secure" is "free "from care"; and the second, objectively, of a thing or place, is "free from damage, safe, secure". In *Sowter* v. *Steel Barrel Co. Ld.* (2) on the construction of s. 10, sub-s. 1 (*c*), of the Factory and Workshop Act, 1901, which provided that: "all "dangerous parts of the machinery . . . must either be securely "fenced or be in such position or of such construction as to be

---

(1) Factories Act, 1937, s. 13, sub-s. 1: "Every part of the trans-"mission machinery shall be securely "fenced unless it is in such a posi-"tion or of such construction as to "be as safe to every person employed "or working on the premises as it "would be if securely fenced".

(2) (1935) 154 L. T. 85.

"equally safe to every person employed or working in the factory "as it would be if it were securely fenced", the court by a majority construed the word "safe" as meaning "actually "safe"—that safety to be obtained by secure fencing or by safe position or by safe construction. The machine in that case was dangerous and unfenced. Lord Hewart, C.J., said: "If, in fact, "this machine could not possibly be made safe, the conclusion "would be that it would have to be scrapped". Again he said: "It is to be observed that the words are 'securely fenced', not "'somewhat securely fenced'"; a little later the expression employed is "safe" not "moderately safe". Hawke, J., agreed with the Lord Chief Justice, but Lawrence, J., dissented, saying that no authority was cited which laid down that the words "securely fenced" meant so fenced that an accident could not happen.

Chasteney v. *Michael Nairn & Co. Ld.* (3), was another case where there was no fencing, and Lord Hewart, C.J., repeated what he had said in *Sowter's* case (2). He said that it was necessary that "actually secure fencing should be insisted on". In *Walker* v. *Bletchley Flettons Ld.* (4), on the issue whether a part of a machine was dangerous, du Parcq, J., applied the test of foreseeability, saying: "A part of machinery is dangerous if it is a "possible cause of injury to anybody acting in a way in which a "human being may be reasonably expected to act in circum-"stances which may be reasonably expected to occur".

Hilbery, J., in the present case applied the test of foreseeability; but that is not the test applicable to the issue whether a machine is "securely fenced". Lord Hewart, C.J., repeated his view of the words in *Findlay* v. *Newman, Hender & Co. Ld.* (5), another case where there was no fencing, stating that the essential purpose of s. 10, sub-s. 1 (*c*), of the Act of 1901 was to provide absolute safety, so far as fencing could provide it. The obligation on the employer in the case of transmission machinery is absolute, and the adverb "securely" is unqualified. Not one of the three cases in the Divisional Court is strictly in point, because, in each, there was no fencing. In *Vowles* v. *Armstrong-Siddeley Motors Ld.* (6), Slesser, L.J., said that he saw nothing to distinguish the case from *Sowter* v. *Steel Barrel Co. Ld.* (7), "with which decision including the reasons given by "Lord Hewart, C.J., I agree" (8).

In *Lewis* v. *Denye* (9), Viscount Simon said: "Does s. 10 "impose an obligation to provide such a degree of secure fencing

---

(2) 154 L. T. 85.
(3) [1937] 1 All E. R. 376.
(4) [1937] 1 All E. R. 170, 175.
(5) [1937] 4 All E. R. 58.
(6) (1938) 55 T. L. R. 201.
(7) 154 L. T. 85.
(8) 55 T. L. R. 203.
(9) [1940] A. C. 921, 931–2.

C. A.
1950

Burns
v.
Joseph
Terry &
Sons Ld.

" for a dangerous machine as makes the machine no longer " dangerous at all to a reasonably careful workman, even though " this result could only be obtained at the expense of making the " use of the machine impracticable and hence, in effect, prohibiting its use altogether? Or is a dangerous machine to be " regarded as 'securely fenced' under s. 10, if the fencing " protects the workman from danger so far as that can practically " be done, consistently with the machine being used? ". He referred to the view expressed by Salter, J., in *Davies* v. *Thomas Owen & Co. Ld.* (10), which would interpret the sub-section as meaning that " if a machine cannot be securely fenced while " remaining commercially practicable or mechanically useful, the " statute, in effect, prohibits its use ". Viscount Simon reserved his opinion on that issue.

In *Carroll* v. *Andrew Barclay & Sons Ld.* (11), there is an observation by Lord du Parcq which may be said to be against the construction advanced for the plaintiff. While agreeing that the words " securely fenced " must be given the same meaning in each of the three sections—ss. 12, 13 and 14 of the Factories Act, 1937—he said: " I think that they may well mean, 'so " 'fenced as to give such security from such dangers as may " 'reasonably be expected' ". In *Carr* v. *Mercantile Produce Co. Ld.* (12), Stable, J., said that a machine did not necessarily cease to be securely fenced because, by some act of perverted and deliberate ingenuity, the guard could be forced or circumvented, and the safeguards provided thereby rendered nugatory. The proposition is accepted that, where a workman deliberately breaks fencing, then the machinery may well be " securely " fenced " nevertheless, since the employer cannot guard against that. In *Lyon* v. *Don Brothers, Buist & Co. Ld.* (13), Lord Normand, it is true, said that the standard to be observed is a fence which will prevent accidents from occurring in circumstances which may be reasonably anticipated, but that employers were bound to take into account the possibility of negligent, ill-advised or indolent conduct on the part of their employees, and even of frivolous conduct. This standard, it is submitted, is incorrect and not in accordance with other pronouncements from the bench above cited.

[Somervell, L.J. I see that by s. 17, sub-s. 1, of the Factories Act, 1937, in the case of any machine in a factory being a machine intended to be driven by mechanical power, " (*b*) all " spur and other toothed or friction gearing, which does not " require frequent adjustment while in motion, shall be

(10) [1919] 2 K. B. 39, 41.
(11) [1948] A. C. 477, 486.
(12) [1949] 2 K. B. 601, 608.
(13) 1944 S. C. (J.) 1, 5.

" completely encased, unless it is so situated as to be as safe as " it would be if completely encased ".]

Lastly, if our contentions are wrong and Hilbery, J., was right in applying the test of reasonable foreseeability to the construction of what is meant by the words " securely fenced " in s. 13, sub-s. 1, of the Factories Act, 1937, he applied that test wrongly, concentrating on the foolish conduct of the plaintiff and holding that his conduct was not reasonably foreseeable. That was not the issue. The question was (on this basis): looking at this machinery and the fence put up to protect it, was the fence secure in the sense that provision had been made against any event which could be reasonably foreseen? If there had been no accident or injury, on this construction of the words " securely fenced " could there have been a successful prosecution under s. 13, sub-s. 1? In any event, the trial judge came to a wrong conclusion on the facts. The plaintiff was a youth of seventeen years, and, if both parties were in fault, he should not be saddled with the greater part of the damage.

Geoffrey Veale and *R. Rawden-Smith* for the defendants. The relevant dicta from the cases have already, for the most part, been cited. It is not conceded by the defendants that this machinery was transmission machinery; but the point is not pressed, since this part of the machinery was dangerous. It is clear that either by s. 13, sub-s. 1, or by s. 14, sub-s. 1, this machinery should have been " securely fenced ". Those words must have the same meaning in each sub-section. It is the contention of the defendants that it was " securely fenced ". Hilbery, J., referred to the note in Redgrave's Factories, Truck and Shop Acts (17th ed.), p. 34, as giving the proper test of what is meant by securely fenced. I agree with counsel for the plaintiff that there is no case which actually decides that issue. The note is in these terms: " The part is, it is submitted, " ' securely fenced ' if the fencing, though it has not prevented the accident under consideration, was such fencing " as removed the possibility of injury to anybody acting in a way " a human being might be reasonably expected to act in circum-" stances that might reasonably be expected to occur ". The author adds that this test of du Parcq, J., stated in *Walker* v. *Bletchley Flettons Ld.* (14), is relevant and material to apply, with the necessary adaptations, when considering whether the part is safe by construction or position. " This latter problem," he writes, " involves also consideration of the special provisions " of s. 15." This, in effect, is the test applicable in considering whether a part of a machine is dangerous: see *Smithwick* v. *National Coal Board* (15).

---

(14) [1937] 1 All E. R. 170, 175.

(15) [1950] 2 K. B. 335.

C. A.
1950

Burns
v.
Joseph
Terry &
Sons Ld.

The words "securely fenced" provoke the question, "fenced "against what?" And the answer is not against every conceivable danger, but against every danger that the occupier can reasonably foresee. That this is the true test was recognized again by Lord du Parcq in *Carroll* v. *Andrew Barclay & Sons Ld.* (16), and by Lord Normand in *Lyon* v. *Don Brothers, Buist & Co. Ld.* (17). Stable, J., said in *Carr* v. *Mercantile Produce Co. Ld.* (18): "The duty . . . is not to fence 'somewhat "'securely', but securely, but there must be some limit placed "on the word 'securely', and a fence does not necessarily cease "to be secure because by some act of perverted and deliberate "ingenuity the guard can be forced or circumvented and the "safeguards provided thereby rendered nugatory". In *Lewis* v. *Denye* (19), Viscount Simon, L.C., spoke of the obligation to provide "such a degree of secure fencing" as makes the machine no longer dangerous at all "to a reasonably careful workman".

Section 13, sub-s. 1, imposes a penalty. Lord Esher, M.R., said in *Tuck & Sons* v. *Priester* (20): "We must be very careful "in construing that section because it imposes a penalty. If there "is a reasonable interpretation which will avoid the penalty in "any particular case, we must adopt that construction. If there "are two reasonable constructions we must give the more lenient "one. That is the settled rule for the construction of penal "sections". Lord Simonds cited this passage with approval in *London & North Eastern Ry. Co.* v. *Berriman* (21), saying: "A "man is not to be put in peril on an ambiguity, however much "or little the purpose of the Act appeals to the predilection of "the court". Lord Wright disagreed, holding that the principle did not apply to Acts such as the Factory Acts. See also the view of Somervell, L.J., in *Franklin* v. *Gramophone Co. Ld.* (22).

The plaintiff here was in breach of s. 119 of the Factories Act, 1937. The judge at the trial found that in any event he was 90 per cent. to blame for the accident. It is submitted that he was in fact wholly to blame.

Hylton-Foster, K.C., replied.

Cur. adv. vult.

Oct. 27. The following judgments were read:—

Somervell, L.J. The judge at the trial in considering the question whether this transmission machinery was securely fenced applied what I may describe as the test of reasonable

(16) [1948] A. C. 477, 486.
(17) 1944 S. C. (J.) 1, 5.
(18) [1949] 2 K. B. 601, 608.
(19) [1940] A. C. 921, 931–2.
(20) (1887) 19 Q. B. D. 629, 638.
(21) [1946] A. C. 278, 313.
(22) [1948] 1 K. B. 542, 558.

foreseeability. Was the machinery securely fenced having regard to circumstances which could reasonably be foreseen? It was not disputed that that was the proper test in deciding whether machinery is dangerous under s. 14, sub-s. 1, of the Factories Act, 1937.

The principle in relation to s. 14 was formulated in a sentence by du Parcq, J., in *Walker* v. *Bletchley Flettons Ld.* (23): "In "considering whether machinery is dangerous you must not "assume that everybody will always be careful. . . . A part of "machinery is dangerous, if it is a possible cause of injury to "anyone acting in a way a human being may be reasonably "expected to act in circumstances which may be reasonably "expected to occur".

The trial judge referred to a note in Redgrave (17th ed.), at p. 34, as in his opinion correct: "The part is, it is submitted, "securely fenced if the fencing, though it has not prevented the "accident under consideration, was such fencing as removed "the possibility of injury to anybody acting in a way a human "being might be reasonably expected to act in circumstances "that might reasonably be expected to occur". The note, as will be seen, is directed to the words "securely fenced" as they occur in s. 14, sub-s. 1, but it seems clear that they must have the same meaning in the two sections.

Mr. Hylton-Foster for the plaintiff submitted that this was wrong. He submitted that machinery is not securely fenced unless it is so fenced as to prevent any accident however improbable and unforeseeable the circumstances in which it happens, saving only a case where a man deliberately breaks the fencing. It must be as secure as any fencing can make it. If this is right then the appeal must succeed, as the fencing could have been carried on up to the ledge, or there could have been a circular return guard, as it was called, going from the edges of the circular mesh all round the pulley wheel.

A number of authorities were referred to, and I will consider them first. The facts in *Vowles* v. *Armstrong-Siddeley Motors Ld.* (24) are the nearest to those of the present case. It is a decision of this court. The case was tried with a jury, and judgment entered for the defendants. There was, as here, a fence, but also a part unfenced, and it was by putting his hand through the unfenced part that the plaintiff's injury had occurred. The jury found that the machinery was securely fenced. If this had stood alone, I think the court would have accepted it on the basis that no one could have reasonably anticipated anyone putting a hand in through this unfenced area. But the jury went on to find that the plaintiff had not materially contributed to the cause of the accident. The court regarded these two findings as inconsistent, and ordered a new trial on the basis that they could not, on the facts as proved, enter judgment for the plaintiff. If Mr. Hylton-Foster is right, it seems to me judgment must have been entered for the plaintiff, and there was no need for a new trial. The machinery was admittedly not as safe as fencing could make it.

---

(23) [1937] 1 All E. R. 170, 175.

(24) (1938) 55 T. L. R. 201.

In *Carroll* v. *Andrew Barclay & Sons Ld.* (25), the question was whether the fencing must be such as to prevent broken machinery from flying out. The actual decision does not, therefore, assist, but in the course of his speech Lord du Parcq said of the words "securely fenced": "I think that they may well "mean 'so fenced as to give security from such dangers as may "'be reasonably expected'".

In *Lyon* v. *Don Brothers, Buist & Co. Ld.* (26), the sheriff-substitute had acquitted the employers on the ground that the machine was not dangerous. I think it is clear on the facts that the machine was not fenced at all, and, if that is so, the actual issue we have to decide was not necessary for the decision, but Lord Normand in the course of his judgment said (27): "If "his work, for example, required him to stand more or less "with his back towards the gear wheels and to use his "hands in front of him, then, of course, it is true that the "gear wheels were beyond his reach, while he was doing his "work, but under different conditions the gear wheels were well "within his reach, and I think that the learned sheriff-substitute "has misdirected himself, for he appears to me to have applied "the test whether the boy was protected by the fence, while he "was carrying on his work in an ordinary way. But in my "opinion that is not the test which should be applied to determine what fencing is necessary under the Act.

"It can be appositely said that the standard to be observed "is a fence which will prevent accidents from occurring in "circumstances which may be reasonably anticipated, but the "circumstances which may be reasonably anticipated include a "great deal more than the staid, prudent, well-regulated conduct "of men diligently attentive to their work, and the occupiers of "factories are bound to reckon on the possibility of conduct very "different from that. They are bound to take into account the "possibility of negligent, ill-advised or indolent conduct on the "part of their employees, and even of frivolous conduct, "especially where young workers are employed. If the fencing "is to secure operatives against injury which may reasonably be "anticipated in that sense, then I am of opinion that there was

(25) [1948] A. C. 477, 486.
(26) 1944 S. C. (J.) 1.
(27) Ibid. 5.

"a contravention of the section of the Act". The two other learned Lords agreed.

On the other side, Mr. Hylton-Foster relied on observations in three cases: *Sowter* v. *Steel Barrel Co. Ld.* (28), *Chasteney* v. *Michael Nairn & Co. Ld.* (29), and *Findlay* v. *Newman, Hender & Co. Ld.* (30). In all three cases there was in fact no fencing at all round the machinery, so that the point before us did not arise for decision. In the first case, which was regarded, I think, as the leading case, it is plain that an accident of the kind that had happened had been foreseen, as, for a time, a guard, which would have prevented the accident, had been used. This is equally clear in the last case, where words were used by Lord Hewart, C.J., which seem to indicate the test contended for by Mr. Hylton-Foster. In that case the accident happened while two men were repairing a belt while certain mill gearing was in motion. There was an express prohibition of this which showed that its possibility had been realized. Mr. Hylton-Foster relied on the statement by Lord Hewart in that case that the purpose of the sub-section is to provide absolute safety, so far as fencing can provide it.

I do not think that there is any decision on the point binding on this court. The balance of dicta is slightly against the contention of Mr. Hylton-Foster. The words used by Lord Hewart, C.J., are on the face of them in his favour, but Lord Hewart did not, I think, have in mind the issue whether the "absolute safety" was to be against foreseeable risks. Lord du Parcq and Lord Normand were clearly addressing their minds to the point in issue, and *Vowles'* case (31) is very nearly a direct authority against the argument.

I will, however, consider the question of construction on principle. In the first place, I think that in this group of sections the same test should be applied in deciding whether machinery is "securely fenced" as is applied in deciding whether it is "dangerous". To an allegation that machinery which has in fact caused injury is dangerous, it is admittedly a good answer to prove that it was not dangerous in any reasonably foreseeable circumstances. I see no difficulty in applying the same test to the question whether machinery is securely fenced, and would respectfully adopt the form in which the question is formulated on this basis by Lord du Parcq and Lord Normand.

I think also that this construction fits in with the later words of the sub-section. They contemplate that the position of the transmission machinery may be such that there is no necessity to fence at all. If, no accident having happened, one imagines

(28) 154 L. T. 85.

(29) [1937] 1 All E. R. 376.

(30) [1937] 4 All E. R. 58.

(31) 55 T. L. R. 201.

a prosecution based on these words, I would have thought the prosecution would have to establish that in reasonably foreseeable circumstances the machinery was not as safe as it would be if securely fenced. If one has to consider unforeseeable circumstances the legislature should and would, in my opinion, have provided that all transmission machinery must be completely encased.

This construction also fits in with the later words from another angle. The later words contemplate that the position may make any fencing unnecessary. That being so, the "position" might well be such as to make fencing, for example, on one side only necessary. Mr. Hylton-Foster's argument, I think, negatives this possibility.

Further, if the construction placed on the words by the judge is a reasonably possible construction, then, this being a statute imposing penalties, it should, in my opinion, be adopted. I think, myself, that it is the natural construction. Having regard to the view taken by Lord du Parcq and Lord Normand, and that taken by the judge at the trial in this case, it seems to me impossible to suggest that it is not a reasonable construction.

In *Franklin* v. *The Gramophone Co. Ld.* (32), I expressed (33) my respectful agreement with what Lord Simonds had said in *London & North Eastern Ry. Co.* v. *Berriman* (34). Lord Simonds cited with approval the following passage from the judgment of Lord Esher, M.R., in *Tuck & Sons* v. *Priester* (35): "We must be very careful in construing that section because it "imposes a penalty. If there is a reasonable interpretation "which will avoid the penalty in any particular case, we must "adopt that construction. If there are two reasonable construc- "tions we must give the more lenient one. That is the settled "rule for the construction of penal sections".

Lord Wright, who in the case of *London & North Eastern Ry. Co.* v. *Berriman* (34) dissented, had suggested that that principle did not apply to Acts such as the Factory Acts and to the Act being considered in that case, which was the Railway Employment (Prevention of Accidents) Act, 1900. Lord Simonds regarded the principle as applicable to all provisions imposing penalties, including those where the object of the Act, as here, was the protection of the life and limb of certain workers. "A "man is not to be put in peril upon an ambiguity, however much "or little the purpose of the Act appeals to the predilection of "the court" (36).

I therefore think that the judge applied the right test. Mr. Hylton-Foster argued in the alternative that on this basis the judge came to the wrong conclusion. He submitted that the judge concentrated on the plaintiff's conduct, and, holding as he did, that that was not reasonably foreseeable regarded that as concluding the issue. Mr. Hylton-Foster submitted that that was not the right approach. The question was not whether what the plaintiff actually did was reasonably foreseeable, but whether the occupier should have reasonably foreseen the possibility of an accident. I agree with that. The question is whether a prosecution would have succeeded before the accident which leads to the claim has happened. On the other hand, if, an accident having happened, no one can suggest other circumstances which would have led to an accident, the issue may in fact narrow itself to the question whether the circumstances which led to the accident were reasonably foreseeable.

---

(32) [1948] 1 K. B. 542.
(33) Ibid. 557–8.
(34) [1946] A. C. 278, 312–14.
(35) 19 Q. B. D. 629, 638.
(36) [1946] A. C. 278, 313–14.

I think that this criticism of the judge's judgment fails. I do not think that the judge confined himself to considering the foreseeability of the plaintiff's conduct. He referred to the fact that the factory inspector had seen this fencing many times; that there was evidence of no previous accident over the twenty years or so of its life; he considered the possibility of someone putting a hand up underneath the mesh; and he said: "I "personally cannot see, if you test the question by what was "reasonably foreseeable, that it can be said that the lack of "a return guard over it from the face guard rendered this in-"secure fencing". It is only after this, that he proceeds to consider whether the employers could have foreseen what the plaintiff actually did.

Mr. Hylton-Foster further submitted that in any event the judge came to the wrong conclusion. On this basis the question is one of fact. The judge in a careful judgment seems to me to have considered all relevant circumstances, and I agree with the conclusion to which he came for the reasons which he gave. I would therefore dismiss the appeal.

COHEN, L.J. I have had the opportunity of reading the judgment of my brother Somervell. I agree entirely with the conclusion to which he has come, and I do not desire to add any observations of mine in agreeing that the appeal should be dismissed.

DENNING, L.J. The rotating gear wheel was clearly transmission machinery which had to be "securely fenced". Now, fencing means the erection of a barricade to prevent any employee from making contact with the machine, see *per* Lord Porter in *Carroll* v. *Andrew Barclay and Sons Ld.* (37); and a machine is "securely fenced" if the barricade is such as to prevent any employee from moving into contact with it (see *per* Lord Morton in the same case (38)).

---

(37) [1948] A. C. 477, 486.

Applying this test, the wire mesh was clearly insufficient, for it only barricaded the wheel from a frontal approach, and not from the flanks, which were left wide open; and any employee could put his hand or arm through them, accidentally or deliberately, and reach the wheel.

I wish I could end my judgment there, for it is really all that is necessary. But I must go on because it is said that, in considering whether a machine is "securely fenced", the court must consider whether the action of the employee in getting caught by it could be foreseen. I cannot see what that has to do with it. It seems to me that foreseeability only arises at the next stage, if and when it is said by the occupier that the machine was "in such a position or of such construction "as to be as safe . . . as it would be if securely fenced".

The primary obligation on the occupier is to see that the machine is "securely fenced". Once the prosecution proves the absence of fencing, then if the occupier relies on the exception "as safe as it would be if securely fenced", the burden is on him to prove it, not on the prosecution to negative it. See *Chalmers* v. *Speedwell Wire Co. Ld.* (39), and *Carroll's* case (40). The test of the exception is foreseeability. If you can foresee the possibility of a man moving into contact with the machinery, when unfenced, it is clearly not as safe as if securely fenced. But if you cannot foresee anyone coming into contact with it, then it is as safe as if securely fenced. A good illustration is given by *Carroll's* case (40), where twenty feet of the belt was not fenced, but that twenty feet was in such a position that no one could anticipate that a man could move into contact with it, and no man did, so it was held to be as safe as it would be if securely fenced (see *per* Lord Porter (41)).

Once foreseeability is accepted as the test of the exception it cannot also be the test of the primary obligation. Sub-section 1 of s. 13 enjoins the court to make a comparison between machinery which is unfenced and the same machinery as it would be if it was securely fenced. You can only make that comparison by first visualizing an effective barricade in position, and then asking yourself whether the machinery is as safe as if the barricade was there. If you should seek to make the comparison by asking what could be foreseen you would get nowhere, because foreseeability would be both the test of "securely

---

(38) [1948] A. C. 492.
(39) 1942 S. C. (J.) 42.
(40) [1948] A. C. 477, 484.
(41) Ibid. 486.

C. A.

1950

BURNS
v.
JOSEPH
TERRY &
SONS LD.

Denning, L.J.

" fenced " and also the test of " as safe as if securely fenced "; so that no comparison would be possible. The view which I have expressed is strongly supported by s. 15, which shows that, when considering whether machinery is " as safe " as if securely fenced, you consider the persons who might move into contact with it; that is, you consider foreseeability, but there is no such provision in seeing whether it is " securely fenced ".

The effect of s. 15, is, I think, this. If you can foresee that someone might unnecessarily examine an unfenced machine, whilst in motion, and thus come into contact with it, it is obviously not as safe as if securely fenced; but if the only person you can foresee as coming into contact with it is an examiner over eighteen years of age, making a necessary examination, then you need not fence the machinery so long as you make sure that the various conditions of s. 15 are complied with. But you must at your peril make sure that they are complied with. If a boy of seventeen, for instance, should do the examining, or if a workman should make an examination, which it is unnecessary to carry out whilst in motion, you are liable whether you could have foreseen his action or not; and the reason you are liable is because the machine is not " securely fenced ", and you cannot avail yourself of s. 15 to say it is " as safe " as it would be if securely fenced (see s. 130, sub-s. 3, of the Act and *Nash* v. *High Duty Alloys Ld.* (42)). This shows that the question of " secure fencing " depends not on foreseeability, but only on whether there is an effective barricade round the machine.

The cases on s. 14 do not present any difficulty to my mind. The question of whether machinery is " dangerous " when unfenced, is, of course, a question of degree and depends on the foreseeable contingencies. So also is the question whether it is " as safe " as if securely fenced. Those two questions normally stand or fall together, because once a machine is found to be dangerous it must be securely fenced, and the occupier can only avoid fencing by showing that it is " as safe " as it would be if securely fenced, a thing he cannot do in the case of a dangerous machine, unless he can avail himself of s. 15. It is apparent, therefore, that in cases under s. 14, unless s. 15 applies, the only inquiries are: first, is the machine dangerous; and, second, if so, is it securely fenced? The answer to the first question depends on foreseeability, and the courts apply the test laid down by du Parcq, J., in *Walker* v. *Bletchley Flettons Ld.* (43), recently approved by this court in *Smithwick* v. *The National Coal Board* (44). The answer to the second question

(42) [1947] K. B. 377.

(43) [1937] 1 All E. R. 170, 175.

(44) [1950] 2 K. B. 335.

depends on the effectiveness of the barricade and on compliance with s. 16, and the courts apply the test laid down by Salter, J., in *Davies* v. *Thomas Owen & Co. Ld.* (45), as approved by this court in *Miller* v. *William Boothman & Sons Ld.* (46); see also *Lotinga* v. *North Eastern Marine Engineering Co.* (1938) *Ld.* (47), *per* Tucker, J. (48).

The reference to s. 14 prompts the reflection that, if the test whether machinery is "securely fenced" were to depend on foreseeability of danger then it would be the same as the test whether the machinery is "dangerous" or not, and there would be no distinction between ss. 12 and 13 on the one hand and s. 14 on the other hand. Prime movers and transmission machinery would only have to be fenced if they were dangerous, whereas the statute makes it clear that they must be fenced whether they are dangerous or not: see *Carroll's* case, *per* Lord Porter (49). I recognize that the words of Lord Normand in *Lyon* v. *Don Brothers, Buist & Co. Ld.* (50), and of Lord du Parcq in *Carroll's* case (51), appear to be contrary to the view I am here expressing of the meaning of "securely fenced", but I do not think they were directing their minds to the point that arises here.

My conclusion is, therefore, that foreseeability is not the test whether a machine is "securely fenced". The true test is whether there was an effective barricade to prevent any employee from making contact with the machine. Applying that test, I think that the machinery was not securely fenced. It was not suggested either at the trial, or before us, that it was in such a position, or of such a construction, that it was as safe as it would be if securely fenced. There was, therefore, in my opinion, a breach of sub-s. 1 of s. 13 of the Act.

The only remaining question is one of contributory negligence. This boy was only seventeen, and he was cleaning the machine in motion on a Friday morning, whereas he ought to have waited till the Friday afternoon, when it was stationary. That is just the sort of thing, carelessness of that kind by boys of that age, that the Factory Acts are especially intended to provide against (see s. 15 of the Factories Act, 1937).

In these circumstances I am not much disposed to allow the occupier to throw all his responsibility off on to this boy by the plea of contributory negligence. I should myself put much the greater responsibility on the occupier. The Contributory Negligence Act, 1945, gives ample scope for a just and equitable

(45) [1919] 2 K. B. 39.
(46) [1944] K. B. 337.
(47) [1941] 2 K. B. 399.
(48) Ibid. 403–4.
(49) [1948] A. C. 477, 483.
(50) 1944 S. C. (J.) 1.
(51) [1948] A. C. 477, 486.

award, and I should have made the occupier bear at least two-thirds of the damage.

I know that this court does not normally interfere with the judge's assessment of responsibility, but I think we should do so here because he does not seem to have had sufficient regard to the fact that the accident was to a boy of only seventeen.

I would therefore be in favour of allowing the appeal.

Appeal dismissed.

Solicitors: *Gibson and Weldon for John Whittle, Robinson and Bailey, Manchester; Haslewood, Hare & Co. for Bromley and Walker, Leeds.*

C. G. M.

Oct. 23.
1950

Croom-Johnson, J.

CUSTOMS AND EXCISE COMMISSIONERS *v.* E. KEIL & CO. LD.

Revenue—Purchase tax—"Toys and games . . . and appliances, apparatus, accessories and requisites for sports, games, amusements . . . including parts thereof and accessories thereto"—Constructional kits for model aircraft—Parts of model aircraft——Chargeability—Finance Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 49), *s.* 20; *Sch. VIII, group* 20 (1).

Group 20 of Sch. VIII to the Finance Act, 1948 (which determines the rates of purchase tax on chargeable goods) specifies: "Toys and games . . . and appliances, apparatus, accessories and requisites for sports, games, amusements, gymnastics or athletics . . . including parts thereof and accessories thereto".

Sets of materials for the construction of model aircraft and ships are "appliances, apparatus, accessories or requisites for "games or amusements" within group 20 of Sch. VIII to the Act of 1948, and are therefore chargeable goods for the purpose of purchase tax under s. 20 of the Act. So also, consequently, are parts of model aircraft which are sold separately.

Action.

The defendant company manufactured and sold goods of two categories, the first of which consisted of constructional "kits" for the making of model aircraft and ships, and the second of various parts of model aircraft and ships, such as rubber wheels and fuel tanks. The constructional kits were boxes containing such articles as sheets of wood or metal marked or cut out to

1950

CUSTOMS AND EXCISE COMMISSIONERS v. E. KEIL & CO. LD.

the appropriate shape, adhesive material, screws, and a sheet of instructions. The commissioners sought a declaration that the goods in both these categories were " chargeable goods " for the purposes of purchase tax under s. 20 of the Finance Act, 1948, and group 20 of Sch. VIII to the Act (1). The company contended that the language of group 20 was not sufficiently wide and clear in its terms to subject the goods in question to purchase tax.

J. P. Ashworth and *R. J. Parker* for the commissioners.
W. D. Collard and *J. W. Borders* for the company.

CROOM-JOHNSON, J. [after reading s. 20 and group 20 of Sch. VIII to the Finance Act, 1948]: By para. (*a*) of group 20 articles not comprised in paras. (*b*), (*c*) and (*d*) of this group are marked with the word " First " so that the things within (*b*), (*c*) and (*d*) are exempt from purchase tax, and the argument is —and I think it is right—that those things which are not exempt under (*b*), (*c*) and (*d*) are brought within the general words of group 20 by reason of what is said in para. (*a*). That seems to me tolerably plain.

In examining the provisions of a taxing statute I apply the general principle that the language of the statute imposing tax must receive a strict construction, and that any ambiguity must be resolved in favour of the subject and not in favour of the taxing authority.

It was conceded that, if the defendants, out of the boxes of material which they sold, themselves made up the articles and so sold them, purchase tax would be payable by virtue of the language used in the Finance Act, 1948; but it was contended that, as all they do is to sell materials to which one can add by buying various parts, the language does not impose purchase tax with regard to them.

---

(1) Finance Act, 1948, s. 20: " Subject to the provisions of this " Part of this Act . . . the provisions " of Part I of the Eighth Schedule " to this Act shall have effect . . . " in substitution for any enactment " in force before . . . for determining " what goods are chargeable goods " for the purposes of purchase tax and " the rates of purchase tax charge- " able in respect of goods of any " class ".

Group 20 of Sch. VIII specifies: " Toys and games (including coin " or disc operated machines), and " appliances, apparatus, accessories " and requisites for sports, games, " amusements . . . including parts " thereof and accessories thereto:—

" (*a*) Articles not comprised in any " of the following paragraphs of this " Group . . . First (rate of purchase " tax);

" (*b*) Swings, slides (including " water chutes), see-saws, round- " abouts and giant strides, not being " mechanically operated articles. . . " Exempt;

" (*c*) Gliders large enough to carry " human beings, and accessories for " such gliders . . . Exempt;

" (*d*) Boats and other vessels large " enough to carry human beings, and " accessories for such boats and ves- " sels . . . Exempt ".

The first words used in group 20 of Sch. VIII are "toys and "games". I have been asked to say that, inasmuch as a toy is usually something to be found in the possession of people of tender years, an aeroplane constructed from these parts and used by people from at least the ages of 14 to 60 years, cannot be a toy. It is interesting to speculate whether toys cease to be toys if a father likes the look of a Christmas present which he gives to his young son and plays with it himself. I cannot think that that is the test. The meaning of "toy" is well known. The Shorter Oxford Dictionary thus defines it: "applied to small "models or imitations, to ordinary objects used as playthings; "as toy, a cannon, train, etc." That meaning is apparently as old as 1836. Does an article cease to be a toy because it is used by people of riper years? I cannot think so, and these construction kits may well be toys.

The plaintiffs' difficulty about that, however, is that the materials are not made up, and also that some of them by themselves are merely parts to be added to other parts in order to make up the completed article which the builder desires; in those circumstances Mr. Ashworth has, quite rightly, concentrated the more important part of his argument on the general words employed in group 20 to see whether he can cover by that argument all the things which are included in both categories of goods made by the defendants—namely, kits and loose parts. That involves an examination of the meaning of a number of other words.

It has been argued that the building of these models, even by people in combination, cannot be a sport; but I do not decide the question on that basis. Is it a game? A game can presumably be played by oneself, and I do not see why it should not be a game to make out of these materials the model aeroplanes which one desires. I ought not to give any artificial meaning to words in the statute which are of general and ordinary acceptation and use. "Amusement" may be rather difficult to define, but I think that Mr. Collard is in this respect in a greater difficulty. I cannot see why the building of these models is not an amusement. When the ordinary simple meaning of that word is being considered it must not be taken by itself as though it were an isolated word; but regard must be had to its context, the collocation in which it is found: "sports, games, "amusements, gymnastics or athletics". The longer Oxford Dictionary defines "amusement" as "anything which lightly "and pleasantly diverts the attention or beguiles the time: a "pastime, to play a game, a means of recreation". Mr. Collard contends that, because one must have a great deal of scientific knowledge and read many learned pamphlets to enjoy building these models, their construction cannot be a pastime or amusement; but I cannot think that that is really the test. Some people will make a very serious thing out of quite a simple game; and the fact that some people take such things much more seriously than others does not prevent them from being a diversion, amusement or game. I cannot see that that is an answer to the view which I have formed of what the legislature really intended.

I have not considered the words at the end of the introductory paragraph of group 20, namely, " . . . including parts thereof and "accessories thereto". Counsel for the defendants conceded that the parts and accessories in the second category of goods manufactured by the defendants are necessarily included once I have decided, as I have, that the constructional kits in question are appliances, apparatus, accessories or requisites for games or amusements.

Applying the rule that a strict construction must be given to a taxing statute, I am satisfied that the language is precise and plain enough and not subject to ambiguity, and in my judgment the declaration which is asked for ought to be made.

Declaration accordingly.

Solicitors: *Solicitor of Customs and Excise; Seifert, Sedley & Co.*

S. C.

1950
Nov. 7, 10.

Lord Goddard, C.J.

EGERTON *v.* RUTTER AND ANOTHER.

[1950 E. 84]

Landlord and Tenant—Agricultural holding—Yearly tenancy—Farm occupied by tenant and family and managed by son—Death of tenant intestate—Landlord not informed of intestacy—Son and daughter remaining in occupation of farm—Notice to quit addressed to executors of deceased tenant at farm—Validity—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 92, *sub-s.* 3.

Until her death on December 24, 1948, the mother of the defendants, a brother and sister, was tenant to the plaintiff of a farm on a yearly tenancy from February 2, and lived with the

---

[This case was tried before Lord Goddard, C.J., at the Chester Assizes and has been reported at his request with the courteous assistance of counsel engaged in the case and of Mr. Seys Llewellyn, of the Wales and Chester circuit, Barrister-at-Law.]

defendants on the farm. On their mother's death, the defendants remained in possession of the farm, the first defendant continuing to manage it as he had done in his mother's lifetime. A notice to quit, dated January 20, 1949, expiring February 2, 1950, which complied with the requirements of s. 24, sub-s. 2 (*g*), of the Agricultural Holdings Act, 1948, was sent by the landlord's agent addressed to "the executors of the late Mrs. R." and was duly received at the farm. The mother in fact died intestate, and letters of administration were not granted to the defendants until March 5, 1949. They remained in possession, and two instalments of rent were paid by the first defendant during the currency of the notice. No objection was taken by the defendants to the notice to quit until February 2, 1950, when the first defendant informed the landlord's agent for the first time that his mother had died intestate and contended that the notice to quit was bad as having been addressed to her executors. In an action for possession by the landlord:—

Held, (1.) that the fact that the notice to quit was addressed to the executors was a mere falsa demonstratio since the defendants were remaining in possession to all appearances as though they were the legal personal representatives of the deceased tenant and the first defendant was carrying on the management of the farm; (2.) that on the death of the tenant intestate, her estate vested in the President of the Probate, Divorce and Admiralty Division by virtue of the Administration of Estates Act, 1925, but that it was necessary that the farm should be carried on and the first defendant must therefore be regarded as agent for the President; and, consequently, that by virtue of s. 92, sub-s. 3, of the Agricultural Holdings Act, 1948, the notice might be served on him as the agent responsible for the management of the farm; and (3.) that, apart from s. 92, on the death of a tenant from year to year, a landlord was not bound to raise a personal representative as a condition precedent to the determination of the tenancy by a notice to quit, but, in the absence of a personal representative, might treat the party in possession as tenant to all intents and purposes.

Accordingly, as the defendants were claiming and purporting to be tenants in possession and could in no way have been misled by the fact that the notice was addressed to the executors, the notice was good and the landlord was entitled to possession.

Rees v. *Perrot*, (1830) 4 C. & P. 230, and *Sweeny* v. *Sweeny* (1876) I. R. 10 C. L. 375, followed.

ACTION tried at Chester Assizes.

The following statement of facts is taken from the judgment of Lord Goddard, C.J.:—This was an action to recover possession of Park Farm, Little Budworth in the county of Chester of which the plaintiff, Sir Philip Egerton, is the owner. The facts are not in dispute. Until her death on December 24, 1948, Mrs. Mabel Annie Rutter, the mother of the defendants, T. J. Rutter and Mrs. G. A. Booth, was tenant of the farm at a rent of 152*l.* a year. The farm was held on a Candlemas tenancy, that is to say, yearly from February 2. On the tenant's death, the defendants remained in possession of the farm, the management and farming being carried on by the first defendant, as it had been during his mother's tenancy. The landlord wished to recover possession of the farm as he desired to make some changes in his estate arrangements, and he therefore sought to take advantage of s. 24, sub-s. 2 (*g*), of the Agricultural Holdings Act, 1948.

Section 24 imposes certain restrictions on the operation of notices to quit, but those restrictions do not apply where the tenant with whom the contract of tenancy was made has died within three months before the date of the notice to quit and it is stated in the notice that it is given by reason of the death. A notice complying with these requirements dated January 20, 1949, was sent by registered post by the landlord's agent addressed to " the " executors of the late Mrs. M. A. Rutter " and was duly received at the farm; and the receipt for the letter was signed by the second defendant. In fact, the tenant died intestate, and letters of administration were not granted to the defendants until March 5, 1949. The defendants remained in possession, and two instalments of rent were paid during the currency of the notice by the first defendant. The notice was never returned by them, nor did they take any objection to it until February 2, 1950, which was the date of its expiry.

There had been some correspondence between the landlord and the first defendant, who desired to become tenant of the farm, and on October 24, 1949, the landlord wrote: " I much " regret I cannot reopen the question of reletting the farm to " you. You must realize that I only get occupation of the farm " nowadays on the death of a tenant and I am splitting up the " farm and letting it elsewhere ". On February 1, 1950, the landlord's agent wrote thus, addressing the letter to " the " executors of the late Mrs. Rutter ": " Further to my notice " to quit dated January 20, 1949, I have to inform you that " your holding will in future be let in two separate portions, one " portion to the Home Farm, Culton Park, and the other to " Mr. J. F. Mason, the latter to have the homestead. It is " the intention of both parties to enter on the land at once, and " you will understand that you must give them facilities for so " doing. You will also take note that the house and buildings " are to be given up as from May 1, next ". The next day, at an interview, the first defendant informed the landlord's agent that his mother had died intestate and that he should contend that the notice was bad as having been addressed to her executors. This was the first intimation to the landlord or his agent that the mother had died intestate.

Glyn-Jones, K.C., and *Lind-Smith* for the landlord. The notice to quit served on the defendants was valid and effective. Although, strictly, a notice to quit should be addressed to, or served on, the proper person, a misdescription of that person may be a mere falsa demonstratio, which would not invalidate the notice. Thus in *Hawtrey* v. *Beaufront Ld.* (1), where a limited company was the tenant, it was held that a notice addressed to the directors and not to the company, was good. Again, if the persons in occupation were administrators, a notice to quit in which they were described as executors would not be invalidated. A notice to quit should be so construed as to make it effective rather than ineffective, and accordingly the words "executors of the late Mrs. Rutter" in the present case should be construed as meaning the person or persons in whom, for the time being, the tenant's interest is vested. Notice to quit served on a tenant's widow continuing in occupation is presumed to be good until it is shown that probate or letters of administration have been granted to another: *Rees* v. *Perrot* (2).

In *Doe* v. *Williams* (3), a person actually in occupation was presumed to be an assignee of the tenant until the contrary was established. In the present case the first defendant was responsible for the control of the farming operations, and should be presumed to be acting as agent for the person in whom the estate was vested, who in the present case, by virtue of the Administration of Estates Act, 1925, was the President of the Probate, Divorce and Admiralty Division. If that is so, then by s. 92, sub-s. 3, of the Agricultural Holdings Act, 1948, service on the first defendant would be a good service, and the landlord is therefore entitled to possession.

Edmund Davies, K.C., *Mars-Jones* and *Miss H. B. Evans* for the defendants. The notice to quit served on the defendants was bad. It is clear from *Smith* v. *Mather* (4) that, when a contractual tenant dies intestate, until letters of administration have been granted, the only person who can be served with a notice to quit is the President. In the present instance the notice was addressed to the farm and to the executors of the estate, that is to say, to persons then non-existent and who never came into existence. It is true that the defendants lived at the farm, but at the time of the service of the notice they were complete strangers to the legal estate. They were not there by consent of the President, and, although they were holding over, they were not doing so in the capacity of tenants or as agents for the President. That being so, service of the notice to quit

(1) [1946] K. B. 280.
(2) (1830) 4 C. & P. 230.
(3) (1826) 6 B. & C. 41.
(4) [1948] 2 K. B. 212.

1950

EGERTON
v.
RUTTER.

on the first defendant was not a good service under s. 92, sub-s. 3, of the Agricultural Holdings Act, 1948.

Further, the misdescription of the person served was not a mere falsa demonstratio. The notice was addressed to certain people at the farm, namely, the executors, who were non-existent, and the fact that the notice was actually received at the farm in no way altered the position.

Glyn-Jones, K.C., in reply.

Cur. adv. vult.

November 10. LORD GODDARD, C.J., reading his judgment, stated the facts as set out above, and continued: The sole question for determination is whether, as the notice to quit was addressed to the executors of the tenant, it was effective to determine the tenancy. Had there been executors, the question could not have arisen, for, though probate may not have been granted at the time when the notice was served, it is well settled law that the title of executors relates back, though that of administrators does not. A modern case in which this position was discussed is *Ingall* v. *Moran* (5). On an intestacy, the deceased's estate vests in the President of the Probate, Divorce and Admiralty Division of the High Court by virtue of the Administration of Estates Act, 1925, and the title of the administrators dates only from the grant of letters of administration. In my opinion the fact that the notice was addressed to the executor is, at least in the circumstances of this case, a mere falsa demonstratio. The defendants were remaining in possession to all appearances as though they were the legal personal representatives, whether executors or administrators, of the deceased, and were carrying on, or at least the first defendant was, the management of the farm. A landlord cannot know, on the death of a tenant, whether he or she died intestate, or when letters of administration are granted, except perhaps by making a search which might take a great deal of time during which he might lose the opportunity of serving the necessary notice.

In this case the death took place in December and notice had to be served by February 2. Had the landlord or his agent been informed, on receipt of the notice, that the tenant had died intestate, no doubt he might have served a notice to quit on the President, and though such notice would undoubtedly have been good (see, for instance, *Smith* v. *Mather* (6)), it does not follow that the notice could be served on no one else.

The defendants were in possession and could not in any way have been misled into thinking that the notice was intended for anybody but the deceased's representatives then engaged in

(5) [1944] K. B. 160.

(6) [1948] 2 K. B. 212.

carrying on the farm and living on it as in the mother's lifetime. No doubt the legal title was for the time being in the President, but it was necessary that the farm should be carried on, acts of husbandry performed and the animals tended and fed; and for this reason, in my opinion, the first defendant must be regarded as being in the position of agent for the President in whom the legal title was notionally vested. If this view is right, a short answer to the case is to be found in s. 92, sub-s. 3, of the Act of 1948, which provides that any notice " to be given to " or served on a landlord or tenant shall, where an agent or " servant is responsible for the control of the management or " farming, as the case may be, of the agricultural holding, be " duly given or served if given to or served on that agent or " servant ".

But, apart from this section, I think that the notice must be considered as good. I have already said that, in my opinion, addressing it to the executors is mere falsa demonstratio and that no one could be misled into thinking that it could be addressed to any persons other than those really interested, namely, the defendants who were in possession. If so, I think that *Rees* v. *Perrot* (7) is directly in point. There the farm in question had been let to one Davies who was tenant from year to year, and, on his death a notice to quit was served on the widow who remained in possession after his death. It was contended that the notice was bad as it was not shown that the person on whom the notice was served was the personal representative of Davies. Littledale, J., a great authority on all matters relating to real property, overruled this contention, saying (8): " If you show, on the part of the defendant, that " Davies made any will, or that any administration has been " granted, you will raise that point. A personal representative " can only be constituted either by a will or by letters of administration; and without its being proved that there is either the " one or the other, you only show a possibility of there being a " personal representative. I think the lessor of the plaintiff " is entitled to recover ".

That case was considered by the Irish Court of Exchequer in *Sweeny* v. *Sweeny* (9), where Dowse, B., put the matter succinctly, saying: " Since the decision of *Rees* v. *Perrot* (7), " it has been accepted as settled law that, on the death of a " tenant from year to year, the landlord is not bound to raise " the personal representative to the deceased tenant as a condition precedent to the determination of the tenancy by a notice " to quit: he can, in the absence of a personal representative,

---

(7) 4 C. & P. 230.

(8) Ibid. 231.

(9) (1876) I. R. 10, C. L. 375, 379.

1950

EGERTON
v.
RUTTER.

Lord Goddard, C.J.

"treat the party in possession as the tenant to all intents and "purposes. The reason given for this by some is that any person "holding the possession or assuming the ownership of the land "may be treated as assignee of the tenant's interest", and one may observe in passing that executors are assignees though by operation of law. In another Irish case, *Jones* v. *Murphy* (10), Bushe, C.J., said (11): "But when a person dies, who, up to "his death, had been a tenant from year to year under a certain "landlord, if that landlord should afterwards wish to put an end "to that tenancy from year to year, he is not bound to look about "for, or set up, a personal representative for his deceased tenant, "but may serve his notice to quit upon the tenants in "possession".

That the defendants here were claiming and purporting to be tenants in possession, there is no doubt. Indeed, as I have already said, they paid two quarters' rent, or the first defendant did. They could in no way have been misled by the fact that the notice was addressed to the executors, and, for the reasons which I have given, I am of the opinion that, both on the authorities which I have quoted and by the effect of s. 92, sub-s. 3, of the Act of 1948, the notice was good and there must be judgment for the landlord.

Judgment for the plaintiff.

Solicitors: *Birch, Cullimore and Co., Chester; Turner and Wayman-Hales, Chester, for R. S. Rigby, Northwich.*

P. B. D.

(10) (1840) 2 J. & S. 323.

(11) Ibid. 332.

C. A.

1950
Nov. 14, 15.

Evershed, M.R., Asquith and Jenkins, L.JJ.

KERRIDGE *v.* LAMDIN.

[Plaint No. F. 994.]

Landlord and tenant—Application for new tenancy—"Within two "months after service of notice"—Construction—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *ss.* 4, 5, *sub-ss.* 1, 2.

By s. 5, sub-s. 1, of the Landlord and Tenant Act, 1927, a tenant who has received notice to quit premises where he has been carrying on business may, if he thinks that the compensation for loss of goodwill to which he would be entitled under s. 4 of the Landlord and Tenant Act, 1927, would be insufficient, give notice to the landlord under s. 5, sub-s. 1, requiring the grant of a new lease.

By sub-s. 2, "Where such a notice is so served, the tribunal, on "application . . . by the . . . tenant . . . where the tenancy "is terminated by notice, within two months after the service of "the notice, may . . . order the grant of a new tenancy . . .".

The "notice" referred to in the expression "within two months "after the service of the notice" is the notice to quit, and not the tenant's notice under s. 5, sub-s. 1, of intention to claim a new lease.

APPEAL from Deputy Judge Reginald Clark, K.C., sitting at Kingston-on-Thames county court.

By an agreement dated September 15, 1942, the defendant let to the plaintiff on a quarterly tenancy a lock-up shop and room at 17 Brighton Road, Surbiton, at the yearly rent of 50*l.* together with a payment in respect of rates, payable by monthly or quarterly instalments as might be agreed. The tenant carried on on the premises the business of selling poultry foodstuffs, corn, seed and fertilizers. On March 23, 1950, the landlord's solicitors gave the tenant notice to quit on June 24, 1950. On April 6, 1950, the tenant, by his solicitors, gave notice to the landlord under the Landlord and Tenant Act, 1927, that the sum which could be awarded to him under s. 4 of the Act for compensation for loss of goodwill would be insufficient and that instead he required the grant to him, under s. 5, sub-s. 2 (1), of a new lease of the premises.

These proceedings for the grant of a new lease were instituted on June 3, 1950, and the landlord applied on June 8 that the tenant's application should be struck out as being out of time. The deputy county court judge dismissed the application. The landlord appealed.

---

(1) Landlord and Tenant Act, 1927, s. 5, sub-s. 1: "Where the "tenant alleges that, though he "would be entitled to compensation "under the last foregoing section, the "sum which could be awarded to him "under that section would not com-"pensate him for the loss of good-"will he will suffer if he removes to "and carries on his trade or business "in other premises, he may in lieu "of claiming such compensation, at "any time within the period allowed "for making a claim under the said "section, serve on the landlord notice "requiring a new lease of the pre-"mises at which the trade or business "is carried on to be granted to him".

Sub-section 2: "Where such a "notice is so served, the tribunal, "on application being made for "the purpose either by the land-"lord or by the tenant not less "than nine months before the term-"ination of the tenancy, or, where "the tenancy is terminated by notice, "within two months after the ser-"vice of the notice, may, if it con-"siders that the grant of a new "tenancy is in all the circumstances "reasonable, order the grant of a "new tenancy for such period (being "a term of years absolute) not "exceeding fourteen years and on "such terms as the tribunal may "determine to be proper . . .".

L. A. Blundell and *J. T. Plume* for the landlord. The application to the court to obtain a new lease must, on the true construction of s. 5, sub-s. 2, of the Act of 1927, be made within two months of the landlord's giving notice to quit. This is clear on the language of the sub-section, and it receives support from s. 4, sub-s. 1, which requires notice claiming compensation for loss of goodwill to be made within one month of the landlord's serving notice to quit on the tenant; and also from s. 5, sub-s. 1, which requires notice claiming a new lease in lieu of compensation to be made within the same period. So, too, when in s. 5, sub-s. 2, provision is made for proceedings in the county court being taken within two months of the service of the notice, the notice referred to is that served by the landlord on the tenant terminating the tenancy, and not that served by the tenant on the landlord. On the clear reading of the sub-section this must be so. Other provisions indicating the same thing are in s. 2, sub-s. 1, and s. 6, the latter of which relates to a notice by the landlord that he is prepared to grant a new lease so as to prevent the tenant from claiming compensation for loss of goodwill. It is not, however, necessary to refer to those other sections, for there is really no ambiguity in s. 5, sub-s. 2. [He referred to *Clift* v. *Taylor* (2) as to the policy of the court where there is an ambiguity.] Further, there is no jurisdiction to extend the time limit fixed by the statute itself: *Donegal Tweed Co. Ld.* v. *Stephenson* (3). In Merlin on the Landlord and Tenant Act, 1927 (3rd ed.), p. 41, the same view is taken of the construction of s. 5, sub-s. 2, as is contended for here.

Cecil Binney for the tenant. The county court judge was right in his view. Service of a notice is referred to three times in s. 5. It occurs twice in sub-s. 2 and, where the expression is " within two months after the service ", service must have the same meaning as when it is used earlier. This argument would not apply to s. 4 for it has been expressly decided that service under s. 4 is very different from that in s. 5. Surely it is a more reasonable construction to say that two months from the notice claiming the grant of a new lease is meant.

[EVERSHED, M.R. That would very much delay things.]

But a reasonable time must be given. One of the strongest points for the tenant is that to construe the sub-section as meaning two months from the notice to quit almost creates an absurdity. The legislature has given one month for each step, and yet on this construction the full time allowed to the tenant to make his application to the court would be the same as the time allowed to the landlord under s. 6 within which to give notice of his willingness to grant a lease of alternative accommodation.

---

(2) [1948] 2 K. B. 394, 400.

(3) (1929) 45 T. L. R. 503.

This might well cause the tenant's application to be unnecessary. It is on that ground that the judge decided in the tenant's favour in the county court. Further, in Cheshire's Modern Real Property (5th ed.), p. 175, the construction contended for is suggested for s. 5, sub-s. 2.

JENKINS, L.J. This case raises a short question of construction on the Landlord and Tenant Act, 1927. [His lordship stated the facts, and continued:—] In that state of affairs, s. 5, sub-s. 2, of the Act of 1927 came into operation. Its effect stated in neutral form is that, in the case of a periodic tenancy (which is the type of tenancy here in question), where a notice claiming a new lease has been served, the tribunal, that is to say, the county court, may make an order granting a new lease, and settling its terms, upon an application for that purpose being made by the landlord or the tenant within the period of two months therein mentioned. The tenant made his application to the county court less than two months from the date of the service on the landlord of his notice claiming a new lease, but more than two months from the date of the service by the landlord on him of the notice to quit, the date of the application to the county court being June 3, 1950.

In those circumstances, the landlord applied to the county court for an order striking out the tenant's application on the ground that it was out of time inasmuch as the time limit of two months ran from the date of the service by the landlord of the notice to quit and not from the date of the service by the tenant of his claim to a new lease. The deputy county court judge held that, on the true construction of sub-s. 2 of s. 5, time ran, as contended by the tenant, from the date of the service of the tenant's notice claiming a new lease, and not, as contended by the landlord, from the date of the service of the notice to quit. It followed, in the view of the deputy county court judge, that the landlord's application was ill-founded, and he dismissed it accordingly. Hence the present appeal.

In the course of the arguments before us, Mr. Blundell, for the landlord, contended that his view was clearly right upon the true construction of the particular sub-section, but he also called in aid various other provisions of the Act in regard to notices which, in his submission, supported his view of s. 5, sub-s. 2, more than they did the construction advanced by Mr. Binney on behalf of the tenant. Mr. Blundell further called in aid the general principle that, inasmuch as the Landlord and Tenant Act trenches upon the common-law rights of landlords, the benefit of any doubt should be given to the landlord. He also relied on the view expressed in Merlin on the Landlord and Tenant Act, 1927 (3rd ed.), p. 41, to the effect that the contention advanced on behalf of the landlord in the present case was right.

Mr. Binney, on the other hand, claimed that, inasmuch as the Act was designed for the protection of tenants, the benefit of any doubt should be given to the tenant. He contended that his construction fitted in better with the other provisions of the Act, and, in particular, he called attention to s. 6, the section under which a landlord may offer alternative accommodation. He pointed out that, if Mr. Blundell's construction were adopted, the full time allowed to the tenant for making his application to the tribunal would coincide exactly with the time allowed to the landlord within which to give notice under s. 6 of his willingness to grant a lease of alternative accommodation; and that this might result in the tenant's making an unnecessary application to the tribunal. Mr. Binney further relied on the opinion expressed in Cheshire on Modern Real Property (5th ed.), p. 178, to the effect that his construction of sub-s. 2 of s. 5 of the Act was the right one.

After paying my best attention to these general arguments on either side, I find that I can really derive very little assistance from them. What has to be done in this case is to construe s. 5, sub-s. 2, of the Act of 1927. If an attempt to construe it discloses some ambiguity or something on the face of it inconsistent or unreasonable, then, no doubt, it is right to resolve the doubt by seeing which interpretation will fit in the better with the general scheme or intention of the Act. The primary task, however, is to construe the sub-section, and, if the construction is clear, then effect must be given to it according to its clear terms, and the result cannot be affected merely because some different provision might be thought to be more appropriate or more consonant with the other terms of the Act. A matter of this kind, namely, the limitation of a period of time within which an act has to be done under a given piece of legislation, is necessarily a matter which must be dealt with in a somewhat arbitrary fashion; a time has to be allowed, and, provided that the period prescribed is reasonably sufficient to allow the act in question to be done, there is no particular reason why the period selected should be one, two or three months, or any particular length of time more than another. All that can be said is that, to make legislation such as this workable at all, it is necessary that definite periods should be fixed for the taking of the various steps provided for; and the construction of any particular provision as to time is not a matter on which much assistance can be expected from general principles.

Turning now to the construction of s. 5, sub-s. 2, I find it desirable to begin by a reference to sub-s. 1 of s. 4. Section 4 provides for compensation for goodwill, s. 5 being the section which gives the alternative right to a new lease in lieu of compensation. Sub-s. 1 of s. 4 opens in this way: "The tenant of "a holding to which this Part of this Act applies shall, if a claim "for the purpose is made in the prescribed manner—(i) in the "case of a tenancy terminated by notice, within one month after "the service of the notice on the tenant; and (ii) in any other "case, not more than thirty-six nor less than twelve months "before the termination of the tenancy; be entitled, at the "termination of the tenancy on quitting the holding, to be paid "by his landlord compensation for goodwill . . .". It is to be observed that the method of fixing time is there made to depend on whether the tenancy is a tenancy for a fixed term or a tenancy terminated by notice. In the case of a tenancy for a fixed term, the time is limited by reference to a minimum period before the termination of the tenancy, that is to say, before the date fixed for the termination of the tenancy; while, in the case of a tenancy terminated by notice, the time is limited by reference to a maximum period after the service of the notice. That formula is worth noting in view of the language of s. 5, sub-s. 2. It is perhaps worth mentioning that a very similar formula appears in sub-s. 1 of s. 1, which is one of the sections concerning the tenant's right to compensation for improvements. The formula there used is in substantially the same terms as the formula appearing in s. 4, sub-s. 1, except that, in the case of a tenancy terminated by notice, the period allowed is one month after the notice was served on or by the tenant, that variation being due to the fact that a tenant can claim compensation for improvements, although, where he is a periodic tenant, he himself chooses to determine the tenancy.

I now pass to s. 5. Sub-s. 1 gives the tenant the option to claim a new lease instead of compensation for goodwill. [His lordship read the sub-section.] In this case a notice claiming a new lease was duly served by the tenant within one month after the service of notice to quit.

Then comes sub-s. 2, on which the present controversy centres, and, so far as material, it provides: "Where such a notice is "so served, the tribunal, on application being made for the "purpose either by the landlord or by the tenant not less than "nine months before the termination of the tenancy, or, where "the tenancy is terminated by notice, within two months "after the service of the notice, may, if it considers that the "grant of a new tenancy . . .". It will be seen that there are references there to two notices. The first reference is to the notice served by the tenant under s. 5, sub-s. 1, claiming a new lease; the second reference is to the notice terminating the tenancy served on the tenant by the landlord. There is then a third reference to a notice, which gives rise to the difficulty and occurs in the phrase: "Within two months after the service "of the notice". Is the reference to "the notice" intended

C. A.
1950

KERRIDGE
v.
LAMDIN.

Jenkins, L.J.

to refer to the notice claiming a new lease served by the tenant under s. 5, sub-s. 1, or to the notice terminating the tenancy served by the landlord?

Construing the words according to their ordinary, grammatical meaning in the order on which they appear, I confess, speaking for myself, that I find it impossible to understand the reference to "the notice" in the phrase "within two months after the service of the notice" as a reference to anything else than the landlord's notice to determine the tenancy. That is the notice last previously mentioned, and, to my mind, nothing short of a gymnastic feat of construction can carry the reference back, over the intervening reference to the landlord's notice determining the tenancy, to the original reference to the notice served by the tenant claiming a new lease which appears at the beginning of the sub-section. Were it not for the contrary view formed by the deputy county court judge, and for the conflict between the views expressed by Mr. Merlin on the one hand and Professor Cheshire on the other, I would find the point clear beyond argument.

I should add that I think that the natural construction of the sub-section, as I have stated it, is strongly supported by the occurrence of the same formula—though in inverted order—in sub-s. 1 of s. 4, and, with variations, in sub-s. 1 of s. 2 of the Act. I think the conclusion irresistible that sub-s. 2 of s. 5 is here intended to prescribe the same starting point for the period of time therein allowed as is prescribed for the purposes of the original claim under sub-s. 1 of s. 4.

The point is not one which is capable of any great elaboration. Giving the matter the best consideration that I can, I have come to the conclusion that the construction placed on that sub-section by the deputy county court judge cannot be supported, and that, on the true construction of the sub-section, the period of two months within which the application to the court might be made ran from the date of the service on the tenant of the notice to quit, with the result that the tenant's application to the tribunal was out of time.

One reaches a conclusion of this kind with some regret, for it is never very satisfactory that a possibly meritorious claim should be excluded merely because the claimant has inadvertently allowed the time to expire; but, where a statute confers a right and stipulates that it must be exercised within a prescribed period, that period must be observed; and, in the absence of any provision in the Act allowing the time limit to be relaxed, failure to observe the prescribed period must inevitably be fatal to the claim. For these reasons, this appeal should be allowed.

EVERSHED, M.R. I am of the same opinion. I think that the geographical position, so to speak, in which the relevant

C. A.
1950

KERRIDGE
v.
LAMDIN.

Evershed, M.R.

words to be construed are found in the sub-section essentially produces the result that the word "notice", where used for the third time, is a reference to the notice used for the second time, that is, the notice determining the tenancy—normally, of course, a notice to quit by the landlord, but, possibly, a notice of termination by the tenant. In my judgment, the arguments which Mr. Binney has put forward, including the reference to the "serving" of the notice in the relevant passage, and the arguments founded upon s. 6, are not of sufficient gravity to displace what I regard as the natural and, indeed, inevitable construction of the language used.

As regards the second point mentioned by the deputy county court judge, I cannot myself derive much assistance from it. Assuming that there is ambiguity, and assuming, as is no doubt a fact, that applications under this sub-section would normally be made by a tenant, nevertheless, upon its language, the sub-section is intended to provide for application either by the landlord or the tenant. In this particular case it is the tenant who suffers by his failure to give notice in time; but there might be a case in which a landlord was desirous of making application, and, that being so, there appears to me to be no room for the application of the principle which the deputy county court judge invoked, even if the conditions were such as to allow its invocation.

As regards the question of extending time, Mr. Blundell referred us to the decision of the Divisional Court in *Donegal Tweed Co. Ld.* v. *Stephenson* (4), and Mr. Binney has not felt able to advance any argument that that case was not well decided. In other words, he has not felt able to put any argument before us that the court has power to extend the time where either landlord or tenant, as the case may be, has failed to observe the time limit prescribed by the Act. I entirely agree with the judgment given by my brother.

Asquith, L.J., who is unable now to be present, has authorized me to say that he agrees with the judgments which have been delivered.

Appeal allowed.

Solicitors: *Joynson-Hicks & Co., for W. Davies & Sons, Woking; Hancock & Scott, for Higgs, Thompson & Samwell, Epsom.*

H. C. G.

---

(4) 45 T. L. R. 503.

C. A.

1950
Nov. 29.

Evershed, M.R.,
Singleton, L.J., and
Vaisey, J.

R.M.R. HOUSING SOCIETY LD. *v.* COMBS.

[Plaint No. F. 110.]

Landlord and tenant—Rent restriction—Tenancy conditional on tenant's remaining in employment of third party—Whether an "obligation of the tenancy"—Breach of condition—Right of landlord to recover possession—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *Sch. I, para.* (*a*).

The landlords, a limited company, let a dwelling-house to a tenant who was employed not by them but by an associated company. The tenancy agreement was expressed to be made in consequence of that employment. It provided by cl. 2: "This tenancy is conditional upon the tenant being and remaining in the said "employment and it shall be an obligation of the tenancy on the "part of the tenant that he shall be and remain so employed. "Determination of such employment from any cause whatsoever "shall terminate the tenancy". The tenant having left the employment, the landlords sought to recover possession. The county court judge made an order for possession, holding that the condition in cl. 2 of the tenancy agreement was a condition of the tenancy and binding on the tenant under s. 15, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and that the tenant accordingly had broken "an obligation of the tenancy" within the meaning of para. (*a*) of Sch. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, so that there was jurisdiction to make an order for possession. On appeal by the tenant:—

Held, that the provision in the tenancy agreement that it was conditional on the tenant's remaining in his existing employment was not "an obligation of the tenancy" within para. (*a*) of Sch. I to the Act of 1933, for the words "obligation of the tenancy" denoted an obligation arising out of the tenancy, and did not include personal obligations of the tenant. Accordingly, since no obligation of the tenancy had been broken, there was no jurisdiction to make an order for possession.

Observations of Bankes and Scrutton, L.JJ., in *Barton* v. *Fincham*, [1921] 2 K. B. 291, applied. *Bute* (*Marquis*) v. *Prenderleith*, 1921 S. C. 281, considered.

Appeal from Judge Dale, sitting at Aylesbury County Court.

The plaintiffs, R.M.R. Housing Society Ld., were a housing association under the Housing Act, 1936, and were a company affiliated or associated with other companies of the Rothschild group of companies. The defendant, Ernest Addison Combs, was employed or about to be employed by R.M.R. Engineering Ld., also one of the Rothschild companies. By a tenancy agreement dated July 2, 1948, made between the landlords of the one part and the tenant of the other part it was provided by cl. 1: " The society, in consequence of the employment " of the tenant by R.M.R. Engineering, of Brook Street, Tring, " Herts. . . . and for the purpose of enabling the tenant more " conveniently and efficiently to perform the duties of the said " employment but subject always to compliance with the condi- " tion hereinafter mentioned hereby lets and the tenant hereby " takes the premises known as 17 Meadow Close, Tring, Herts., " To hold the same from Saturday, July 3, 1948, from week to " week until the condition hereinafter mentioned in [cl.] 2 hereof " shall cease to be satisfied or until the tenancy shall be deter- " mined in the manner hereinafter provided "—at a weekly rent.

Clause 2 provided, " This tenancy is conditional upon the " tenant being and remaining in the said employment and it shall " be an obligation of the tenancy on the part of the tenant that he " shall be and remain so employed. Determination of such " employment from any cause whatsoever shall terminate the " tenancy ".

Clause 5 provided, " Either party may terminate the tenancy " at the end of the second or any subsequent week by giving " to the other party two weeks' previous notice in writing expiring " on a Friday Provided always that upon the event of the condi- " tions mentioned in [cl.] 2 hereof ceasing to be satisfied the " tenancy shall thereupon terminate automatically without the " need for either party to give any notice to the other ".

The tenant continued to be employed by R.M.R. Engineering Ld., until June, 1950, when he terminated his employment with that company and obtained employment some ten miles from the dwelling-house in question where he lived. The landlords in these proceedings claimed possession of the premises on the ground that the tenant had infringed an obligation of the tenancy and that accordingly there was jurisdiction in the court to make an order for possession under para. (*a*) of Sch. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (1).

The county court judge made an order for possession. He stated his reasons as follows: " The defendant was employed by " R.M.R. Engineering, a subsidiary Rothschild company, until " June, 1950, when he left this employment at his own request in

---

(1) The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sched. 1: " A court shall, for the " purposes of s. 3 of this Act, have " power to make or give an order or " judgment for the recovery of posses- " sion of any dwelling-house to which " the principal Acts apply or for the " ejectment of a tenant therefrom " without proof of suitable alternative " accommodation (where the court " considers it reasonable so to do) if " —(*a*) any rent lawfully due from " the tenant has not been paid, or " any other obligation of the tenancy " (whether under the contract of " tenancy or under the principal " Acts), so far as the obligation is " consistent with the provisions of the " principal Acts, has been broken or " not performed ".

C. A.

1950

R.M.R. Housing Society Ld. v. Combs.

"order, as he said, to better himself. He was then tenant of a "house owned by the plaintiffs under a written agreement of July "2, 1948. One of the conditions of this agreement was that he "should remain tenant only so long as he was in the employment "of R.M.R. Engineering. After leaving this employment he continued in possession under s. 15, sub-s. (1) of the Rent Act, "1920. It was argued by counsel for the tenant that this condition of tenancy was inconsistent with the provisions of the "Rent Acts and that therefore Sch. I, para. (*a*) to the 1933 Act "did not apply. I did not accept this argument and held that the "condition continued to be binding on the tenant under s. 15, "sub-s. 1 of the 1920 Act and that the tenant had broken an "obligation of the tenancy within the meaning of Sch. 1, para. "(*a*) of the 1933 Act. After fully considering the question of "whether it was reasonable to make the order for possession, "I found on the facts that it was so and ordered possession in "six weeks".

The tenant appealed.

R. F. Hannay for the tenant. The tenant's first contention is that the provision of the tenancy agreement that it is conditional on the tenant remaining in the employment of R.M.R. Engineering Ld., is an obligation which is inconsistent with the Rent Restriction Acts and is accordingly void. The tenant relies on the decision of the Court of Appeal in *Barton* v. *Fincham* (2), which establishes that a tenant cannot contract out of the Acts.

[He referred to *Artizans, Labourers and General Dwellings Co. Ld.* v. *Whitaker* (3); *Brown* v. *Draper* (4); *Remon* v. *City of London Real Property Co. Ld.* (5).] Secondly, it is contended that this obligation is not an "obligation of the tenancy" within para. (*a*) of Sch. I to the Act of 1933.

There appears to be no authority on the meaning of the phrase "obligation of the tenancy". It is submitted that it refers to some obligation affecting the subject-matter of the demise and which touches and concerns the land: it does not include a personal obligation of a tenant. This obligation is not one which would run with the land in an assignment of the tenancy. It is merely a collateral undertaking. It is submitted that the county court judge was wrong in holding that he had jurisdiction to make an order for possession. If he is right in holding that this condition is within para. (*a*) of Sch. I, then para. (*g*) of the Schedule is unnecessary.

[He referred to *Regional Properties Ld.* v. *Oxley* (6).]

(2) [1921] 2 K. B. 291.
(3) [1919] 2 K. B. 301.
(4) [1944] K. B. 309.
(5) [1921] 1 K. B. 49.
(6) [1945] A. C. 347.

Dennis Thompson for the landlords. It is submitted that the obligation which the tenant undertook is "an obligation of the "tenancy" within para. (*a*). In construing para. (*a*) regard must be had to s. 15 of the Act of 1920, which provides that so long as a tenant retains possession he shall observe "all the terms and "conditions of the original contract of tenancy, so far as the same "are consistent with the provisions of this Act".

It is submitted that para. (*a*) must not be construed too narrowly. In holding that this is "an obligation of the "tenancy" the court will not deprive the tenant of the protection of the Acts, since an order for possession can only be made if it is reasonable to make it. Whether this provision is an obligation or a condition is immaterial. The tenant is seeking to take advantage of his own breach of his undertaking and he should not be permitted to do so. The obligation is not inconsistent with the Rent Restriction Acts.

[He referred to *Bute* (*Marquis*) v. *Prenderleith* (7).]

Singleton, L.J. [after stating the facts]: The argument of Mr. Hannay for the tenant in this court was that the case did not fall under para. (*a*) of Sch. I to the Act of 1933 at all. [His lordship read the paragraph.] He said that in the circumstances of this case, there was not any obligation of the tenancy which had been broken or not performed, and that no order could be made under that part of the schedule. He submitted further that, if it could be said that the obligation to work or to continue working for R.M.R. Engineering Ld. was an obligation of the tenancy, then that obligation was not consistent with the principal Acts, and, consequently, that part of the Schedule did not apply at all.

Counsel referred to a number of authorities, some of which were decisions under the earlier Acts. In *Barton* v. *Fincham* (8), this court, on an appeal from the Divisional Court, was concerned with a case under s. 5, sub-s. 1, of the Act of 1920, which subsection was in terms very similar to those of para. (*a*) of Sch. I to the Act of 1933. Section 5, sub-s. 1 provided: "No order or judgment for the recovery of possession of "any dwelling-house to which this Act applies, or for the eject-"ment of a tenant therefrom, shall be made or given unless—(*a*)"—and this is the only material part—"any rent lawfully due "from the tenant has not been paid, or any other obligation of the "tenancy (whether under the contract of tenancy or under this "Act) so far as the same is consistent with the provisions of "this Act has been broken or not performed". It was held in that case "that the jurisdiction of the court to make an order for "possession is restricted by the above enactment; that if the conditions upon which alone an order can be made are not fulfilled, "an order cannot be made in invitum notwithstanding any agreement of the parties to the contrary; and that consequently the "landlord could not recover".

---

(7) 1921 S. C. 281.

(8) [1921] 2 K. B. 291.

The importance of that decision lies in words used by Bankes, L.J., and by Scrutton, L.J. Bankes, L.J., said (9): "The "language used is so clear and precise that there is in my opinion "no room for cutting down or restricting the operation of the "section. The legislature has definitely declared that the court "shall exercise its jurisdiction only in the instances specified in "the section, and in no others". He added (10): "In my "opinion s. 5 is an instance of a case where the legislature has in "clear and unmistakable language restricted the jurisdiction of "the court, and where no agreement between parties can give the "court a jurisdiction which the legislature has said it is not to "exercise. This is by no means the only statute in which the "legislature has secured the object it had in view by limiting the "exercise by the courts of their full jurisdiction".

Scrutton, L.J., said (11): "The position of a tenant who, "having agreed in his contract of tenancy to give up possession on "a named day, holds over and stays in possession after that day, "has been explained by this court in *Remon's* case (12), and I "do not repeat it. It is enough to say that he becomes a statutory tenant at his own will and cannot without his consent be "ejected either by peaceable entry or by the order of a court unless the conditions mentioned in s. 5 of the Act of 1920 are "present and the court makes an order. . . . But if he is in possession and unwilling to give it up, possession can only be obtained "by an order of a court which order can only be made if certain "specified facts are proved. One of these facts is that an obligation of the tenancy, so far as the same is consistent with the "provisions of this Act, has been broken. This qualification was "necessary, for every tenancy contains an obligation to deliver "up possession at the end of the tenancy, of which obligation "staying in possession is a breach. The qualification was not contained in the Act of 1915, but was held, I think rightly, by Astbury, J., in *Artizans Dwellings Co.* v. *Whitaker* (13) to be "necessarily implied, as without it the whole sub-section would "be meaningless. A tenant who agrees in the contract of tenancy "to give up possession on a named day does not contract out of the "Act, and the agreement does not prevent the provisions of the

---

(9) [1921] 2 K. B. 295.
(10) Ibid. 296.
(11) Ibid. 297
(12) [1921] 1 K. B. 49.
(13) [1919] 2 K. B. 301.

"Act from applying, and it is difficult to see why an agreement "to the same effect made after the contract of tenancy should "have any better results".

I mention one further authority, *Brown* v. *Draper* (14), where Lord Greene, M.R., said of a tenant: "He cannot contract to "give up his right to claim protection".

The sole question in this appeal, I think, arises on the meaning of the words "obligation of the tenancy". If the tenant in the present case is shown to have broken an obligation of the tenancy, it was right to make an order for possession against him. Unless that was shown, it was not. The submission on behalf of the tenant, as I have said, was that no obligation of the tenancy was broken. In other words, that the undertaking, obligation, condition, or whatever you call it, that the tenant should give up possession, if he ceased to be employed by R.M.R. Engineering Ld., was not an obligation of the tenancy at all. It was submitted that before there could be an obligation of the tenancy there must be an obligation arising out of the tenancy and relating to the subject-matter of the tenancy. In other words, that it must be binding on the tenant as tenant and not merely something binding on him as an individual. In my view, that submission is right. If it were not so, a very wide breach would be made in the Rent Restriction Acts. The words "obligation of the "tenancy" appear in para. (*a*) of Sch. I to the Act of 1933, and there must be some purpose in them. The words are not "obliga-"tion of the tenant", but "obligation of the tenancy". That denotes that the obligation must be an obligation arising out of the tenancy itself. It is not enough to say that the tenant has broken some covenant or failed to fulfil some obligation which he undertook: there must be a breach of an obligation of the tenancy.

Clause 2 of the agreement in its first part says that the tenancy is conditional on the tenant's being and remaining in the employment. There follow the words "and it shall be an obliga-"tion of the tenancy on the part of the tenant that he shall be and "remain so employed". I think that it would be better to describe that as an undertaking by the tenant or an obligation of the tenant. It is not strictly an obligation of the tenancy, and it does not become so merely because those words are inserted in the agreement. They are words taken from para. (*a*) of Sch. I. Thus it has not been shown that there was any breach of an obligation of the tenancy.

That is sufficient for the purposes of this appeal, but Mr. Hannay submitted further that if we were to read para. (*a*) of Sch. I as the landlords would have it read and as the county court judge has read it, then para. (*g*) of the schedule would become unnecessary. That paragraph provides for the case of a landlord, the owner of a house, who has a workman working for him and who has let the house to the workman in consequence of his employment with the landlord. In such a case, if the tenant ceases to be employed by the landlord, the landlord can obtain an order for possession if he shows that the dwelling-house is reasonably required by him for occupation as a residence by some person engaged in his whole-time employment, etc. The landlord would be able to avoid having to give proof of this additional fact if a clause such as that in the present case were inserted in the agreement and if it were held to have the effect given to it here by the county court judge.

---

(14) [1944] 1 K. B. 309, 313.

For these reasons I do not consider that it has been shown that the landlords have brought themselves within the provisions of para. (*a*) of Sch. I to the Act of 1933, and in the result the order for possession ought not to have been made.

I would add this: so far as I can see the owners of the house were endeavouring to carry out their duties quite properly; they were seeking in the lease to protect the houses which they had in that they were required for workmen employed on work for affiliated or associated companies. But I do not think that the method adopted succeeds in the circumstances of this case. There is no suggestion that the one company was acting as the agent of the other. In my view the appeal should be allowed.

Evershed, M.R. I am of the same opinion. Although we have heard no argument upon it, I see no reason whatever to doubt the validity of that part of the judge's judgment in which he said that the making of an order, if he had power to make it, would be reasonable. The case must, as I think, be examined on the footing that the employer was some third person in no way whatever connected with the landlords. Further, it must not be forgotten, as it has been many times laid down, that in all cases of this kind there are two conditions which the landlord must establish: first, that the court has jurisdiction to make the order, and, second, that it is reasonable so to do. We in this appeal are concerned only with the first condition, and it is no answer to an argument on jurisdiction that the tenant would be protected by reliance upon the second matter, reasonableness only.

The relevant term of this lease is expressed so as to consist of a condition, an obligation and a limitation—all three. In so far as it is a limitation, that is to say, in so far as it provides that the tenancy is to determine upon the happening of a particular event, that is something outside para. (*a*) of Sch. I altogether. Certainly, it would wholly defeat the object of the Rent Restriction Acts, if it were otherwise. It is indeed of the essence of the

Acts that, on the happening of the event which determines the contractual tenancy, nevertheless the tenant is in certain circumstances entitled to remain in possession. In so far as the clause consists of a condition or obligation, it is at least open to doubt whether such an obligation is enforceable at law at all, for it appears on the face of it to be an obligation to continue to serve a particular individual. But whatever be the answer to that question, for reasons which have already been stated, and with which I agree, I think that the clause, in so far as it is a condition or obligation, is not within para. (*a*) of Sch. I to the Act of 1933, because it is not " an obligation of the tenancy ". I agree with Mr. Thompson that those words " obligation of the " tenancy " must not be given a restricted or narrow meaning: they should be construed according to their ordinary sense.

So construed, the phrase " obligation of the tenancy " I take to mean something binding on the tenant as such, that is to say, in his capacity as tenant, as distinct from an obligation purely personal and collateral to the contract of tenancy. It is a legitimate method of testing this particular form of lease to consider what the position would be in the event of an assignment of the term during its contractual subsistence. I need not, however, further pursue that matter. I also agree with my brother that if this obligation were an " obligation of the tenancy "—and I add that for present purposes I think no valid or useful distinction can be made between that phrase in para. (*a*) and the phrase " terms and conditions of the original contract of tenancy " in s. 15 of the Act of 1920—still it would not be an obligation consistent with the Rent Restriction Acts. It has been laid down in the authorities which Singleton, L.J., has quoted, that parties to a tenancy cannot so contract that, although the conditions are present which, Parliament has declared, cause the Acts to apply to the premises, nevertheless those Acts shall not apply. I think that if this condition were treated as effective, the result would be inevitably to produce a contracting out of the Act within the meaning of that formula which I have just given.

I think also that the expansion of that formula provides the answer to the point which Mr. Thompson urged, namely, that here it was of the essence of the contract, indeed it was the basis of the contract, that cesser of the relevant employment should disentitle the tenant from the right to further occupation. I think, as my brother has pointed out, that, if this is not held to be an obligation inconsistent with the Acts, it will be apparent that in all cases where there is a landlord employer and a tenant employee —a common case—para (*g*) is, so to speak, wholly circumvented. Moreover, I can see no distinction in principle between a provision to the effect that the tenancy shall determine automatically on the tenant's ceasing to be employed by AB and a provision that the tenancy shall determine automatically upon the tenant's receiving notice to quit. It would be possible to frame by suitable language a clause which would, if the argument is right, so far as I can see, render the Act wholly inoperative in every case that can be imagined. In other words, the parties would have done that which the courts have said they cannot do, contracted themselves out of the ambit of the Act.

I wish in conclusion to say one word upon the case in the Inner House of the Court of Session in Scotland which was relied upon, *Bute* (*Marquis*) v. *Prenderleith* (15). The decision was that there was no tenancy at all, the true relationship between the Marquis of Bute and Prenderleith being that of master and servant, so that the occupation of the latter was a service occupancy and not a service tenancy. But the Lord President in the course of his judgment undoubtedly used language which seems to indicate that he thought that para. (*a*) might apply in a case between a landlord and a tenant if the tenant, having been in the employment of the landlord and having taken his tenancy on the terms that he continued to serve the landlord, then determined his contract of service. The Lord President appears to have thought that, if he had put it out of his power to perform his obligations as to service, he might not be able to rely on the Rent Restriction Acts because of para. (*a*). But the point in the present case was not, so far as I can see, adumbrated. The various considerations which we have had in mind are not indicated in the judgment, this part of it being purely obiter. Moreover, the decision related to the effect of the Act of 1920 and to a case where the landlord was the employer; which is not the present case. As at present advised, I am inclined to share the doubt which, I think, is entertained in Megarry on the Rent Acts (5th ed.), p. 24. But it is unnecessary to express any final view upon the correctness or applicability of that decision, because the circumstances were different. It certainly is not an authority which compels or, as I think, advises us to decide otherwise than in the way Singleton, L.J., has suggested.

For these reasons, as well as those stated by Singleton, L.J., I think that this appeal must be allowed.

VAISEY, J. For the reasons stated by my Lords, I agree that this appeal succeeds and I have nothing to add.

Appeal allowed.

Solicitors: *Wodehouse & Furneaux; Ellis & Ellis, for Horwood & James, Aylesbury.*

B. A. B.

---

(15) 1921 S. C. 281.

C. A.

1950
Dec. 1, 4.

Cohen,
Asquith and
Denning, L.JJ.

CLIFFORD *v.* CHARLES H. CHALLEN & SON LD.

[1950 C. 19.]

Master and servant—Use of dangerous substance in factory—Synthetic glue liable to cause dermatitis—Prophylactic not kept in shop although obtainable by workmen at store in factory—Duty of foreman—Welfare provision not safety provision—Safe system of work—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 42.

Where an employer has in constant use, in a workshop, a material dangerous to his workmen (such as a synthetic glue which is a cause of dermatitis if the glue is left to dry on the skin), the employer has not performed his duty if he keeps the recognized prophylactic (such as, in the case put, "barrier cream") in the store of the factory, from whence it can be drawn for use by either foreman or workmen: it must be available at the shop, where the workman is using the material. The man in charge of the work in the workshop is responsible for seeing, so far as he can, that the workmen make use of this recognized prophylactic. If injury (in the case put, dermatitis) results from the employer's failure to take these precautions, he will be responsible to the injured workman in damages at common law for his failure to provide a safe system of work. The injured workman is guilty of contributory negligence if he knows that the material is dangerous, knows of the recognized prophylactic and where it is kept, and does not use it.

Section 42 of the Factories Act, 1937, has no application to a case of this type: it is one of the "welfare" not one of the "safety" provisions of the Act.

Decision of Sellers, J., reversed.

Appeal from Sellers, J.

In 1943, a notice was issued by H. M. Stationery Office about the danger of dermatitis arising from synthetic glue. This substance was much used during the war in the making of aircraft. It has special advantages over other glue because it can withstand extremes of climate, but it is likely to produce dermatitis if it is allowed to dry on the skin. This notice, since it was issued, had been recognized, both by the manufacturers of the glue and by employers who use it, as laying down the proper precautions which ought to be taken when this glue is used. Although the Court of Appeal were not referred to and did not know of any statute giving the notice statutory effect, Denning, L.J., said that it afforded a safe basis on which the common law could build, because the courts would certainly have regard to any failure to take the precautions referred to in the notice.

So far as material, the notice was in these terms: "Dermatitis "from glues (synthetic). Cautionary Notice: N. B. Glue must "not be allowed to dry on the skin. Dermatitis is an inflammation of the skin starting with redness and irritation. Some of "the ingredients of synthetic (chemical) glues and hardeners "may cause dermatitis, but this can generally be avoided by "taking the following precautions. Before starting work. 1. "After washing, dry the hands and apply the special barrier "preparation (skin protective) provided. Re-apply after each "washing. At work. 2. Roll the sleeves down and fasten them "at the wrists; the arms are then protected. 3. Never allow "glue (especially if mixed with the hardener) to dry on the skin. "Wipe it off at once with the damp swab provided. Wash, using "the special soap, if the amount of glue on the skin is more than "a trace".

In 1946, the plaintiff went to the factory of the defendants, who were manufacturers of radio sets and of pianos, as a trainee. He worked in the radio cabinet shop for about six months, and then for the remaining three years of his service he was in the piano fitting shop, where upright pianos were being fitted together. In 1949, the plaintiff suffered from dermatitis and subsequently brought his action, claiming that his dermatitis was due to breach of the statutory duty imposed by s. 42 of the Factories Act, 1937 (1), and/or to the failure of the employers at common law to make use of a safe system of work. He alleged that the employers did not provide a special protective cream, called barrier cream, and that they did not provide in the shop where he worked running water in which he could wash.

It was common knowledge in these works that there was a danger of dermatitis arising from the use of the synthetic glue and that it was necessary to take precautions against it. The plaintiff himself knew of this danger and knew of the precautions which should be taken. In the radio shop, the notice issued by H. M. Stationery Office was exhibited and he himself read it. In that shop barrier cream was provided. Women brought it from the store for the men to use, and there were two buckets of water in which the men could wash. But in the piano fitting shop there was no notice and there was no barrier cream. No containers were provided for fetching it. If a man did not have a small tin or jar of his own, he could get the cream from the store on a piece of grease-proof paper, and then take it back to the shop and there apply it, and so protect himself. But none of the workmen did it in this shop. There was only one bucket

---

(1) By s. 42 of the Factories Act, 1937, included under Pt. III of the Act: "Welfare (General Provisions): "(1) There shall be provided and "maintained for the use of employed "persons adequate and suitable facilities for washing which shall include "soap and clean towels or other suitable means of cleaning or drying, "and the facilities shall be conveniently accessible, and shall be kept "in a clean and orderly condition".

C. A.
1950

CLIFFORD
v.
CHARLES H
CHALLEN &
SON LD.

of water for washing the hands. The barrier cream was kept in the factory store. The plaintiff and the other men in the piano fitting shop could have obtained the cream from the store if they had wished. The foreman of this shop was asked: "Was barrier "cream popular?" He replied: "I do not think so. I had not "a great belief in it myself". In effect, the foreman's evidence was that he did nothing to enforce or encourage the use by the men under his charge of this barrier cream. The foreman said that the one bucket of water in the shop got very dirty and that he had to complain about it. He eventually got a second bucket, but the men used it for washing rags, and so they reverted to the one bucket for washing hands.

In the factory there was sufficient provision for ordinary washing purposes. There was a lavatory with wash-basins, soap and towels, where the men could wash. The employers provided a bucket in the workshop and the men were at liberty to change the water in the bucket by going down a few steps and getting hot water from a boiler outside.

Sellers, J., held that there had been no breach by the employers of s. 42 of the Factories Act, 1937 (1), or of their duty at common law to make use of a safe system of work.

The plaintiff appealed.

Edgedale, K.C., and *C. J. A. Doughty* for the plaintiff.
Beney, K.C., and *Stephen Chapman* for the defendants.

The following cases were cited: *Lotinga* v. *North Eastern Marine Engineering Co.* (1938) *Ld.* (2); *Vyner* v. *Waldenberg Brothers Ld.* (3); *Cakebread* v. *Hopping Brothers* (*Whetstone*) *Ld.* (4); and *Finch* v. *Telegraph Construction & Maintenance Co. Ld.* (5).

COHEN, L.J. I will ask Denning, L.J. to deliver the first judgment.

DENNING, L.J. [after stating the facts] The question is whether the employers fulfilled their duty to the workman. The standard which the law requires is that they should take reasonable care for the safety of their workmen. In order to discharge that duty properly an employer must make allowances for the imperfections of human nature. When he asks his men to work with dangerous substances, he must provide proper appliances to safeguard them; he must set in force a proper system by which they use the appliances and take the necessary precautions; and

(2) [1941] 2 K. B. 399.
(3) [1946] K. B. 50.
(4) [1947] K. B. 641.
(5) (1949) 65 T. L. R. 153.

he must do his best to see that they adhere to it. He must remember that men doing a routine task are often heedless of their own safety and may become slack about taking precautions. He must therefore, by his foreman, do his best to keep them up to the mark and not tolerate any slackness. He cannot throw all the blame on them if he has not shown a good example himself.

The first point concerns the barrier cream: did the employers fulfill their duty by keeping it in the store and leaving it for the men to fetch it from the store if they wished? No containers were provided for fetching it. If a man did not have a small tin or jar of his own, he could get the cream from the store on a piece of greaseproof paper and then take it back to the shop, and there apply it and so protect himself. But none of them did it in this shop. The foreman did not insist on it; as he said, he was not a great believer in it himself. In these circumstances, I cannot bring myself to believe that the employers fulfilled their duty to the men. They should at least have done in the fitting shop the same as they did in the radio shop, that is to say, provide the barrier cream in the shop itself; and the foreman should have seen, as far as he could, that the men used it. It is rather like *Finch* v. *Telegraph Construction & Maintenance Co. Ld.* (6), where men were left to go and get goggles if they wanted them, and Devlin, J., held that there was no proper system.

The second point concerns the water. It was said that a bucket in the workshop was not sufficient, and that the employers should have provided running water in the shop itself. I do not think that the employers were guilty of any breach of s. 42 of the Factories Act, 1937. That is one of the "welfare "provisions" requiring that proper facilities shall be provided for washing, including soap and towels. It is not one of the safety provisions. In this factory there was sufficient provision for ordinary washing purposes. There was a lavatory with washbasins, soap and towels, where the men could wash. For ordinary welfare purposes the employers performed their duty. The only question on the water is, therefore, whether the employers fulfilled their common-law obligations. They provided a bucket in the workshop, and the workmen were at liberty to change the water in the bucket by going down a few steps and getting hot water from a boiler outside. As it was very important that the men should wash off any glue from their hands before it got dry, I am not sure that the employers ought not to have provided running water actually in the shop; but, in view of the very close proximity of the boiler, I am not prepared to differ from the trial judge on the point.

---

(6) 65 T. L. R. 153.

I rest my judgment, therefore, on the barrier cream: it should have been provided in the shop itself, and a system should have been established whereby the men used it in accordance with the government notice. That not having been done, the employers were guilty of a breach of duty to their men; and it is a plain inference that that breach of duty was one of the causes of the dermatitis from which the plaintiff suffered.

The remaining question is whether the plaintiff was himself guilty of contributory negligence. The judge did not consider it, because he thought that the employers had not been guilty of any breach of duty. I think that the plaintiff was negligent: he knew that the glue was dangerous; he knew what precautions ought to have been taken; but he did not take them. He knew he could get the barrier cream by going to the store, yet he did not get it. The employers ought, no doubt, to have had it in the workshop; but I do not think that the workman can be acquitted of all responsibility on that account. The employers must take care of the men, but the men must also take care of themselves. The fact that all the men in the shop were negligent does not exempt any one of them from responsibility for his own negligence. The question then arises, in what proportion ought the plaintiff and the employer to share responsibility? On the whole, I think that they should share it equally. The amount of damages which the judge has assessed (665*l.*) should be borne by the parties equally.

ASQUITH, L.J. I have come to the same conclusion as my brother, and after similar hesitation. On balance, I think, by a small margin, and subject to contributory negligence on his part, the plaintiff has suceeded in discharging the burden upon him of showing that his injury resulted from want of a safe working system on the part of the employers. The causes of my doubts were the following: first, we start from a finding of the fact that the plaintiff did in fact read this warning notice in the radio shop which directed him, inter alia, to use barrier cream as a prophylactic when handling synthetic glue. Secondly, it is difficult to see how, or why, knowing, when he was in the radio shop, that this glue was a dangerous material, he should have supposed that it should have lost its dangerous character, and that the precautions enjoined were no longer necessary when he handled exactly the same glue in a different shop in the same factory. There is, again, the fact that there was no difficulty, as he well knew, in procuring this barrier cream from the store. But when all due allowance has been made for these factors, the foreman's evidence that he did nothing on his part to enforce or encourage the use by the men under his charge of this barrier cream, in which he admits he had no particular

C. A.

1950

CLIFFORD v. CHARLES H. CHALLEN & SON LD.

Asquith, L.J.

faith, does seem to me to point to want of a safe working system. When some precaution is omitted which a safe working system would enjoin, and injury ensues to a workman of the kind which might be expected to ensue owing to the omission of that precaution, then there is a presumption that the injury in fact did result from the omission. Therefore, it seems to me, the plaintiff has proved his case; but I feel no doubt whatever, for the reasons given by my Lord, that he was guilty of contributory negligence; and I agree with the proportion suggested for the apportioning of the responsibility.

COHEN, L.J. I am of the same opinion. Where an employer is making use of a dangerous process, it is not enough for him to have available somewhere in the factory the appliances necessary to minimize the danger: the system of working must be one in which the appliances will be available at the place where they are needed, and the man in charge of the work should be responsible for seeing, so far as he can, that the workmen make use of the appliances provided. It seems to me from the evidence in this case that it was recognized that the man in charge should be responsible for seeing that the precautions indicated in the notice were carried out; and it is quite plain from the evidence of the man in charge that he did not perform that duty. I agree that the appeal should be allowed and the order made as proposed by Denning, L.J.

Appeal allowed.

Solicitors: *Shaen, Roscoe & Co.; Goldingham, Wellington & Co.*

C. G. M.

C. C. A.

1950
Dec. 5.

Lord Goddard, C.J., Hilbery and Parker, JJ.

REX *v.* GRANT.

Criminal law—Corrective training—Procedure—Plea of guilty at petty sessions—Committal to quarter sessions for sentence—Notice of previous convictions served on day of summary proceedings—Sentence of corrective training—Regularity—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 23, *sub-s.* 1, *s.* 29, *sub-ss.* 1, 3.

Where a prisoner is committed by justices to quarter sessions for sentence in accordance with s. 29 of the Criminal Justice Act, 1948, it is sufficient to enable quarter sessions to impose on him a sentence of corrective training or preventive detention that the notice of his previous convictions required by s. 23 of the Act was served three days before he was brought up for sentence.

APPEAL against sentence.

On August 3, 1950, the appellant Ronald Morrison Grant pleaded guilty to two charges of larceny before a court of summary jurisdiction sitting at Swindon. He was committed for sentence to quarter sessions by virtue of s. 29 of the Criminal Justice Act, 1948 (1), and, on August 30, he received sentence of two years' corrective training. The notice of the previous convictions which it was proposed to prove against him to enable the court to impose such a sentence was served on him on August 3—the day of the hearing before the justices.

He appealed against his sentence on the ground that quarter sessions had no power to sentence him to corrective training as he was not served with the notice the requisite three days before the hearing by the justices but only before the passing of sentence by quarter sessions.

W. M. Huntley for the appellant. The provisions of s. 23 of the Criminal Justice Act, 1948, concerning the service of the notice of previous convictions have not been observed. The words " before the trial " in that section mean what they say and do not mean " before sentence is delivered "; they also mean " before the beginning of the trial ". The notice should have been served three days before the hearing by the justices. Trial and sentence have always been two separate matters. [Reference was made to *Rex* v. *Governor of Brixton Prison; Ex parte Stallman* (2), and *Van der Poorten* v. *Settlement Officer* (3).]

In *Greene* v. *Croome* (4), a case concerning the interpretation of R. S. C., Ord. 39, r. 4, it was held that the material date to be regarded for the purpose of giving notice of motion for a new trial was the date of the verdict, and not that of the judgment on further consideration.

---

(1) Criminal Justice Act, 1948, s. 23: " For the purpose of determining whether an offender is liable to be sentenced to corrective training . . . no account shall be taken of any previous conviction or sentence unless notice has been given to the offender . . . at least three days before the trial that it is intended to prove the conviction or sentence . . .".

Section 29, sub-s. 1: " Where . . . a person who is not less than seventeen years of age is tried summarily by a court of summary jurisdiction for an indictable offence, and is convicted by that court of that offence, then if, on obtaining information as to his character and antecedents, the court is of opinion that they are such that greater punishment should be inflicted in respect of the offence than that court has power to inflict, the court may . . . commit him in custody to quarter sessions for sentence . . .".

Sub-s. 3: " Where an offender is so committed for sentence . . . the following provisions shall have effect, that is to say:—(*a*) the appeal committee or court of quarter sessions shall inquire into the circumstances of the case, and shall have power to deal with the offender in any manner in which he could be dealt with by a court of quarter sessions before which he had just been convicted of the offence on indictment ".

(2) [1912] 3 K. B. 424, 444.

(3) [1946] A. C. 271.

(4) [1908] 1 K. B. 277.

E. R. Mills for the Crown was not called on.

LORD GODDARD, C.J. The real reason why the court gave leave to appeal was not that they had any doubt as to the true construction of the Act or as to the invalidity of the point which was put forward by the prisoner, but because they thought it desirable to give a decision on this point in case courts of quarter sessions had any doubt about it.

The point taken on the appellant's behalf was that s. 23 of the Act of 1948 provides that notices of previous convictions, showing that the prisoner is qualified either for preventive detention, corrective training, or an order under s. 22, must be served three days before the trial; that he was tried by the justices in petty sessions at Swindon and was only sentenced by quarter sessions; and that as the notice was not served on him before the hearing before the justices, he could not receive a sentence of corrective training.

In the opinion of the court it would be giving far too narrow a construction to s. 29 of the Act, and a most unfortunate construction, if that contention were upheld. It would mean that quarter sessions, as the sentencing court who have to deal with many young offenders with two or three convictions against them, could never send them to corrective training unless the notices had been served before their appearance before the magistrates: a very difficult task for the police in view of their lack of knowledge whether the magistrates were going to hear the cases, where the trial was to be and matters of that sort. It would be a ground for asking Parliament to alter the law very soon if that were the case.

Section 29 provides that, where there has been a conviction before justices, if they discover that the record of the prisoner is such that he deserves a heavier sentence than they can give they can send him forward for sentence to quarter sessions, and he is then dealt with by the appeals committee. The reason for that section is well known: it was to abolish the effect of the two decisions of this court in *R.* v. *Sheridan* (5) and *R.* v. *Grant* (6), in which the court had to hold that if a man had been convicted by justices they could not then commit him for trial, because when he came to trial he could plead autrefois convict. In our opinion s. 29 clearly means that, once a man is sent forward for sentence to quarter sessions,

(5) [1937] 1 K. B. 223.

(6) (1936) 26 Cr. App. R. 8; 52 T. L. R. 676.

he is to be treated in all respects as though he had been committed for trial to quarter sessions in the first instance and will be in the same position as if he had pleaded guilty before them.

It is to be noticed that an express provision is put in to enable him to appeal. An appeal from a conviction before magistrates does not come to this court: it goes to quarter sessions; and if a prisoner who has been sent forward for sentence to quarter sessions wishes to dispute his guilt he still has to appeal to quarter sessions.

As to sentence, s. 29, sub-s. 3 (*d*) provides: "if the appeal " committee or court of quarter sessions passes a sentence which " the court of summary jurisdiction would not have had power to " pass the offender may appeal against the sentence to the Court " of Criminal Appeal as if he had been convicted on indictment; " and the provisions of the Criminal Appeal Act, 1907, shall " apply accordingly". Sub-section 5 provides: "In relation to " an offender committed for sentence under this section, " sub-s. 1 of s. 23 of this Act shall have effect as if for the words " 'by the verdict of a jury' there were substituted the words " 'by the appeal committee or the court of quarter sessions, as " 'the case may be, and not by the verdict of a jury'". That is because if the prisoner disputes his convictions, of which notice has been given, the sub-section provides that that is to be tried by a jury. This sub-section is concerned with the case where a prisoner is brought before quarter sessions, and it means that quarter sessions are for that purpose a jury. The subsection says that quarter sessions or their appeals committee shall try the case instead of its being tried by a jury; but it shows clearly that Parliament intended that every proceeding which took place before quarter sessions should be treated in exactly the same way as if they were trying the man originally and not merely dealing with him for sentence only.

In our opinion these considerations show that it is open to the police or other appropriate authority to serve notice of previous convictions before the prisoner is brought before quarter sessions; and when that is done quarter sessions can pass any sentence as regards which it is requisite that the notice shall be served. If it is served three days before the prisoner is brought up for sentence, that is all that is required, and we cannot hold in this case that the "trial" was the incomplete trial which takes place before justices, for, in our opinion, for this purpose the trial is not complete until sentence has been passed or the prisoner has been ordered to be discharged.

The suitability of the sentence is quite another matter. This court has pointed out more than once, and has done so after the judges of the King's Bench Division have had the advantage of discussing the matter with the Prison Commissioners, who know, as we cannot, the discipline and training which is given in a sentence of corrective training, that corrective training is of very little use in the case of persons of what may be called mature age: it is one which is intended to give something in the nature of an extended Borstal treatment to try to train a man instead of merely imprisoning him. It is, however, a sentence of imprisonment. Again, as a general rule, a sentence of two years, which, if he behaves himself, will only amount to one year and four months, is of very little use to give the man the benefit which it was designed that he should have by this new sentence. We have more than once pointed out that a sentence of two years is, as a rule, inappropriate. A sentence of three years' corrective training, which means two years, is the least sentence which is likely to be of any use.

The defendant is a man 39 years of age and, whatever misfortunes he has suffered in the past, he is a man of good education. But since 1945 he has been continually in trouble. We only refrain from increasing the length of the sentence because his appeal was based not on the ground of the length of the sentence but on the contention that the sentence was one that quarter sessions had not the power to pass. In one way perhaps he did a service by enabling this court to lay down that quarter sessions had power to pass such sentences. We are, therefore, going to set aside the sentence of corrective training and make it one of two years' imprisonment.

As we have held that the notice was properly served, there will also be an order under s. 22.

Sentence varied.

Solicitors: *The Registrar, Court of Criminal Appeal; Tarry, Sherlock & King for Townsends, Swindon.*

S. C.

REX *v.* COHEN.

C. C. A.

1950
Dec. 5, 18.

Lord Goddard, C.J., Hilbery and Parker, JJ.

Criminal Law—Knowingly harbouring uncustomed goods—Burden of proof—Customs Consolidation Act, 1876 (39 *&* 40 *Vict. c.* 36), *ss.* 186, 259.

Once it is proved that a person was in possession of dutiable goods on which he has not proved that duty has been paid, he may, if he gives no explanation of his possession, be convicted of unlawful harbouring. If he gives an explanation, the jury should be told that if it either satisfies them that he did not know that the goods were uncustomed, or leaves them in doubt whether he knew, he should be acquitted.

APPEAL against conviction and sentence.

The appellant, Robert Abraham Cohen, was found guilty before the deputy chairman of Middlesex Sessions on an indictment charging him with knowingly harbouring certain uncustomed goods, namely, 352 Swiss watches and certain other articles, with intent to defraud His Majesty of the duties thereon, contrary to s. 186 of the Customs Consolidation Act, 1876. He was sentenced to twelve months' imprisonment.

The appellant carried on a business of buying and selling watches from his home at Edgware. On February 19, 1949, two Customs investigating officers visited him there, showed him their cards, and asked him where he had acquired the watches which he was selling; he mentioned the names of two firms and showed the officers some watches. On being asked if he had any more, he said that he had not and invited the officers to inspect the house. They did so and found many more watches hidden in various parts of the house.

When giving evidence at his trial the appellant sought to excuse the untruths which he had told by saying that he was frightened because he thought that the Customs officers had come to hold him up and steal his property.

He appealed on the grounds, among others, that the deputy chairman had misdirected the jury as to the burden of proof and had improperly asked the appellant certain questions. The case is reported only on the question of burden of proof.

By the Customs Consolidation Act, 1876, s. 259: "If in "any prosecution in respect of any goods seized for non-payment "of duties . . . or for the recovering any penalty or penalties "under the Customs Acts, any dispute shall arise whether the "duties of customs have been paid in respect of such goods, . . . "then and in every such case the proof thereof shall be on the "defendant in such prosecution . . .".

Marshall, K.C., and *Montague Waters* for the appellant. On a charge brought by virtue of s. 186 of the Customs Consolidation Act, 1876, the onus is on the prosecution to establish that the defendant (a) harboured goods, (b) knowingly, and (c) with intent to defraud the Revenue. But the summing-up suggests that if the defendant failed to prove that duty had been paid on the watches, he would be guilty of the offence of "unlawful "harbouring". Not only was the burden of proving that the goods were not uncustomed put on the defendant, but also that of proving that he did not intend to defraud the Revenue. In many cases it would be almost impossible for a defendant to prove that the duty on certain goods had been paid.

Widgery for the Crown. *Rex* v. *Garth* (1) laid down the proper direction to the jury on a charge of receiving stolen goods where the only evidence against the defendant is his possession of recently stolen goods: where no explanation is given by the defendant, his possession of the goods is evidence which can go to the jury that he received property knowing it to have been stolen; but if the defendant gives an explanation which raises a doubt in the minds of the jury whether or not he knew that the property had been stolen, the defendant is entitled to an acquittal. That is the proper direction to the jury where a person is charged with knowingly harbouring uncustomed goods.

Marshall, K.C., replied.

Cur. adv. vult.

December 18. LORD GODDARD, C.J., read the following judgment of the court:—The first ground of appeal is that the deputy chairman misdirected the jury on the onus of proof, or at least did not adequately direct them, and it was this ground that largely influenced the court in giving leave to appeal. The matters raised are of considerable general importance in this class of case and we hope that our judgment may prove of assistance to courts of quarter sessions, who nowadays not infrequently have to deal with indictments for offences under this section.

First let us consider the ingredients of the offence and what has to be proved by the prosecution in order to establish a prima facie case. Apart from an attempt to defraud (which we will consider separately), the offence consists in knowingly harbouring uncustomed goods, which in our opinion means that the accused person knowingly harboured goods and also knew that they were uncustomed. To prove a conscious harbouring it would usually be enough to show that goods which were subject to duty were found in the possession of the accused person. If they are found in his house, warehouse or other place under his control, that would establish a prima facie case that he knowingly harboured them, though no doubt he could rebut this by proving that he did not know of their presence, for instance, by showing that someone had put them there without his knowledge or privity.

---

(1) [1949] W. N. 170.

Once it is proved that he knowingly harboured goods subject to duty, s. 259 throws on him the onus of proving that the goods are in fact customed. To do this he would have to prove that the duties had actually been paid, or at least that the goods had been declared and that the Customs officers had, in the exercise of a discretion which they are allowed, permitted them to enter. The latter case would probably seldom arise and could only occur in the case of a small amount of spirits, tobacco, jewellery or the like, and we need not deal further with this.

In a case such as the present, unless the accused person is or knows the actual importer, so that a receipt for the payment of duties can be produced or first-hand evidence of payment given, it would probably always be difficult, and often impossible, for him to prove actual payment. Although the powers of officers of Customs are always used with discretion, it is in law possible for them to require anyone, be he trader or not, who has dutiable goods in his possession to show that duty has been paid. But if the person challenged cannot prove payment it does not follow that he must be taken to have committed the offence of what for convenience we will call unlawful harbouring: he will not be guilty unless he knew that duty had not been paid. The prosecution having proved that the accused person was in possession of dutiable goods in such circumstances as would entitle a court to find that he was consciously in possession of them, and the accused person having failed to prove that the duty had in fact been paid, there is then, in the opinion of the court, an onus on him to give some explanation of his possession from which a jury might infer that he did not know that duty had not been paid. That it must be for him to give this explanation is because the facts relating thereto must be exclusively within his knowledge. There is, in fact, a shifting of the burden of proof, and in considering the amount of evidence necessary to shift the burden of proof the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively: see Stephen's Law of Evidence (12th ed.), art. 104; and that this applies to criminal no less than to civil cases is shown by *Rex* v. *Kakelo* (2).

A simple way of proving lack of knowledge is to prove that the goods were bought in the ordinary course of trade. If a man

(2) [1923] 2 K. B. 793.

buys a box of cigars in a shop at the ordinary price, why should it be supposed that he knew they had been smuggled, if in fact they had been? In the course of his summing-up the deputy chairman quoted a passage to this effect from the judgment in *Rex* v. *Fitzpatrick* (3): "If a man buys something from a trader "in the ordinary way (it does not matter whether it is wholesale "or retail), you would presume when he buys it in the ordinary "way that he has bought it honestly and that the duty on it "has been paid". It would perhaps have been more accurate if I had said, "that he had no knowledge or reason to believe "that the duty had not been paid".

It appears to the court therefore that Mr. Widgery was right in his submission that these cases are closely analogous to those of receiving stolen goods when the evidence relied on for the prosecution is merely possession of goods recently stolen. That has always been held to be prima facie evidence of guilty knowledge, or, in other words, to raise a presumption of guilt; so that if no explanation is given by the receiver the jury are entitled, but not compelled, to convict. On the other hand, if the explanation given either satisfies the jury or raises a doubt in their minds as to guilty knowledge, the defendant is entitled to an acquittal. A case is never proved if the sum of the evidence leaves the jury in doubt. So, in the present class of case, once it is proved that the accused person was knowingly in possession of dutiable goods on which he has not proved that duty has been paid, if he gives no explanation, he may be convicted of harbouring. If he does give an explanation, the jury should be told that if it either satisfies them that he did not know the goods were uncustomed, or leaves them in doubt whether he knew, he should be acquitted.

Another ingredient of the offence is the intent to defraud, and of this the jury should be reminded. But, as in all cases where an intent to defraud is a necessary ingredient, the intent must usually be inferred from the circumstances. If a jury are satisfied that the accused person knew that the goods were uncustomed, which would include a case where he has wilfully shut his eyes to the obvious, and he had them in his possession for use or sale, it would follow, in the absence of any other circumstance, that he intended to defraud the Revenue. There may be cases where the circumstances would negative the intent; but ordinarily speaking it is difficult to see how it could be found that he did not intend to defraud the Revenue, certainly in such a case as the present, where the appellant not only had the goods in his possession for the purpose of selling but told lies to the officers when challenged on the matter.

---

(3) [1948] 2 K. B. 203, 211.

C. C. A.
1950

Rex
v.
Cohen.

[His Lordship considered the deputy chairman's summing-up and the questions which he had put to the appellant and concluded:] In the circumstances we are of the opinion that there was no misdirection. The circumstances in which the watches were found, the untruths told by the appellant, and his explanation of why he had told them—which would deceive no one—all point to this case as one in which it would have been impossible for a reasonable jury to return any other verdict than that which they did.

The appeal is dismissed.

Appeal dismissed.

Solicitors: *Arnold Lee & Co.; Solicitor of Customs and Excise.*

S. C.

Affirmed. C.A. [1951] 2 All E.R. 178.

HIGHAM v. HAVANT AND WATERLOO URBAN DISTRICT COUNCIL.

1950
Dec. 7, 8, 14.

Lord Goddard, C.J., Hilbery and Parker, JJ.

Town and Country Planning—Compulsory acquisition of land—Assessment of compensation by arbitrator—Use of land by claimant contrary to planning control—Liability of land to enforcement order—Whether to be taken into account by arbitrator—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *ss.* 23, 51, 55, 75.

Under powers granted by a private Act, a local authority proposed to acquire for certain sea-defence works two plots of land which were used by their owner as sites for caravans. The plots had been bought by the owner in various parcels before August, 1936. No town-planning scheme had been made for the area in which the plots were situated, but in 1928 the Minister of Health had confirmed a resolution by the local planning authority to prepare a scheme. When the owner began to use her land for caravans, there was in force a statutory general interim development order. In December, 1937, she applied for a licence under s. 269 of the Public Health Act, 1936, to use the land for caravan sites, and that application, not having been refused within the time specified in the Act, was, by virtue of s. 269, sub-s. 4, deemed to have been granted unconditionally. After the local authority had obtained power to acquire the land in 1947, they served notices to treat on the owner in June, 1948. The compensation to which the owner was entitled was assessable under Part V of the Town and Country Planning Act, 1947, by an official arbitrator acting under the Acquisition of Land (Assessment of Compensation) Act, 1919.

1950

HIGHAM
v.
HAVANT AND
WATERLOO
URBAN
DISTRICT
COUNCIL.

The Act of 1947 was passed on August 6, 1947. By s. 120, the sections, among others, in Part V were to come into force at once, and the remainder, including s. 75, were to come in force on July 1, 1948, known as the appointed day. Section 51 of the Act, which is found in Part V, is concerned with the acquisition of land after the appointed day. The compensation payable to the owner fell to be assessed under s. 55, which adapts the provisions of s. 51 to the case of land compulsorily acquired at a date between the passing of the Act and the appointed day.

By s. 55, sub-s. 2, the value of any interest in land which has been acquired is to be " ascertained by reference to prices current " immediately before January 7, 1947 and . . . the interest shall " have been deemed to have been subsisting immediately before that " day subject to all incidents to which it is subject on the date " of the notice to treat . . .".

By s. 75, sub-s. 1, where any use made of land on the appointed day was begun in contravention of previous planning control, the provisions of Part III (which includes s. 23) of the Act with respect to enforcement notices are to apply to it " Provided that " an enforcement notice shall not be served by virtue of " s. 75 " in " respect of any . . . use . . . at any time after three years from " the appointed day ".

By s. 23, no enforcement notice may be served after four years from the beginning of the development (which by s. 12 includes a change in the use of the land) of which complaint is made, and by s. 75, sub-s. 9, the use of land is deemed to have been begun in contravention of previous planning control where, at the material time, the land was subject to a resolution to prepare a planning scheme.

On questions submitted by the official arbitrator in connexion with the basis on which the owner was entitled to compensation:—

Held (1.) that the unconditional licence deemed to have been granted to the owner under s. 269, sub-s. 9, of the Public Health Act, 1936, to use the land for caravans did not amount to a planning permission, even though granted by a local authority which was also the local planning authority, since the Act of 1936 was concerned with health and sanitary matters and considerations of town planning were outside its purview. The use of the land by the owner was accordingly in contravention of previous planning control under s. 75, sub-s. 9. *Pilling* v. *Abergele Urban District Council* [1950] 1 K. B. 636, followed.

(2.) That the proviso to s. 75, sub-s. 1, in adapting s. 23 (which is concerned with change of use after the appointed day) to such a case as that before the court, substituted a limitation period of three years from the appointed day for the period of four years from the beginning of the development specified in s. 23, and that accordingly the making of an enforcement order against the owner under the Act of 1947 was not statute-barred under s. 23.

(3.) That the express provision in s. 75, sub-s. 6, that the official arbitrator should, in assessing the compensation, take into consideration the fact that an enforcement notice had been served, could not be taken as impliedly providing that no account should be taken of the possibility of the service in the future of such a notice.

(4.) That the arbitrator was also not debarred from taking into account the possibility of an enforcement notice being served under s. 75 by reason of the fact that the section had not come into force at the date of the notices to treat (there being no power at that date to serve an enforcement notice under earlier town-planning legislation, because no town-planning scheme had actually been prepared for the area in question) for it was known that the owner was in breach of previous planning control and that an enforcement order would be served after the appointed day when s. 75 came into force. Accordingly, the land in question could, on or after the appointed day, be the subject of an enforcement order, and, in assessing the compensation payable, the arbitrator could properly have regard to the possibility that such an order might be made.

SPECIAL CASE stated by an official arbitrator under s. 6, sub-s. 1, of the Acquisition of Land (Assessment of Compensation) Act, 1919.

The following statement of facts is taken from the judgment of the courts:—The claimant, Edith Lillian Higham, was the owner of two pieces of land in the parish of Havant in the county of Southampton known as " the Sealand site ", of about one acre, and " the Creek Road site ", of about half an acre. The various parcels making up these two sites were purchased by the claimant, in the case of the Sealand site at various dates before April 16, 1931, and in the case of the Creek Road site at various dates before August 27, 1936. From the time of purchase the claimant used the Sealand site, and part of the Creek Road site, for movable dwellings, that is, as sites for caravans, and, except for a period during the war when that use was prohibited, continued to do so down to the date of the notices to treat which were served on her. Before the purchases by the claimant, the land had been used for agricultural purposes. No town-planning scheme had ever been prepared covering the area in which the two sites were situated, but on December 7, 1928, the Minister of Health had confirmed a resolution to prepare a scheme passed by the Portsmouth Corporation, the predecessors of the Havant and Waterloo Urban District Council, the acquiring authority. At that time, and when the use of the land for caravans was begun by the claimant, the interim development order applicable was the Portsmouth and District Town Planning (General Interim Development) Order, 1928. No application for consent to that use of the land had ever been made or granted. On December 4, 1937, however, the claimant applied for a licence under s. 269 of the Public Health Act, 1936, to use the land for movable dwellings and, the application not having been refused within four weeks, was, by virtue of sub-s. 4 of that section, deemed to have been granted unconditionally on January 1, 1938.

By the Havant and Waterloo Urban District Council Act, 1947, a private Act, the acquiring authority were given power to acquire certain areas of land, including the claimant's two sites, for sea-defence works, and on June 17, 1948, notices to treat were served on the claimant in respect of the said sites.

The compensation fell to be assessed under Pt. V of the Town and Country Planning Act, 1947. That Act was passed on August 6, 1947, and by s. 120 certain sections, including those contained in Pt. V of the Act, were to come into force at once, whereas the remainder, including in particular s. 75 (which is concerned with the position where existing development contravenes previous planning control) was not to come into force until such day as the Minister might appoint. By an order dated February 9, 1948, the Minister fixed July 1, 1948, as the appointed day.

It was contended for the claimant before the arbitrator:—

(1.) that, having regard to the provisions of sub-s. 4 of s. 269 of the Public Health Act, 1936, the acquiring authority must be deemed to have granted an unconditional licence to use the two pieces of land as sites for movable dwellings;

(2.) that such a licence constituted statutory authority to use the land as sites for movable dwellings and could not be overridden by previous planning control or be deemed to be in contravention of it unless an operative scheme provided for the suspension of the statutory authority already given;

(3.) that if any suspension under s. 2 (*b*) of the Town and Country Planning Act, 1932, were imposed in an operative scheme, such a provision would have to be subject to the payment of compensation under s. 18 of that Act;

(4.) that, in view of the assumed existence of an interim development permission to use the two pieces of land for the actual use on the date of the notices to treat, that actual use was not in contravention of previous planning control within the meaning of s. 75 of the Town and Country Planning Act, 1947;

(5.) that inasmuch as s. 75 of the Town and Country Planning Act, 1947, was not in force at the date of the notices to treat, no regard could be had to the provisions of that section for the purposes of assessing compensation; and that, if regard were had to it, regard must also be had to sub-s. 6 of the section, which required the assumptions of s. 55 to be modified only when the enforcement notice had taken effect;

(6.) that, the development having taken place more than four years before the appointed day, no enforcement notice could issue in respect of it under the combined operation of ss. 23 and 75 of the Act of 1947;

(7.) that the compensation for the compulsory acquisition of the claimant's land must accordingly be assessed on the basis of the use of the land for the approved existing use, free of development charge payable under the Town and Country Planning Act, 1947; alternatively

(8.) that, if the licence granted was personal to the holder, the use of the land by the licensee in accordance with the licence was not a contravention of town-planning control, and therefore that compensation for the compulsory acquisition of the land should include compensation for disturbance.

On behalf of the acquiring authority it was contended:—(1.) that, no interim development permission having been granted under the Town and Country Planning Acts for the " actual use " of the land, such use (where begun after the material date and continued after July 1, 1948) constituted a contravention of previous planning control for the purpose of enforcement notices under s. 75 of the Town and Country Planning Act, 1947; (2.) that a licence granted in pursuance of s. 269 of the Public Health Act, 1936, was personal to the holder and could not be transferred to others by the licensee alone; (3.) that the licence deemed to have been granted under s. 269 of the Act of 1936 did not constitute an interim development permission under the Town and Country Planning Act, 1932; and (4.) that the compensation payable to the claimant should accordingly be assessed on the basis that the actual use of both pieces of land (save as regarded one plot of Sealands site) was liable to an enforcement notice.

The questions stated by the arbitrator for the opinion of the court were:—

(1.) Whether on or after July 1, 1948, the actual use of the two pieces of land (or any part of them) could be the subject of an enforcement notice under s. 75 of the Town and Country Planning Act, 1947, and, if so, whether he might take this into account in assessing compensation.

(2.) Whether a licence under s. 269 of the Public Health Act, 1936, is personal to the licensee.

If the first question should be answered in the affirmative, the second question did not arise. In the event of the first question being answered in the affirmative, the arbitrator assessed the compensation payable in respect of the Sealands site at 380*l*. and in the case of the Creek Road site at 753*l*. If the answer should be in the negative, he assessed the amounts payable at 1,200*l*. and 1,016*l*. respectively.

Sandlands, K.C., and *Geoffrey Howard* for the claimant.

Harold Williams, K.C., and *T. W. L. Roots* for the Urban District Council.

The arguments sufficiently appear from the contentions before the arbitrator and from the judgment of the court.

Cur. adv. vult.

December 14. PARKER, J., reading the judgment of the court, stated the facts as set out above and continued:—As will be seen from the statement of the facts, the notices to treat served on June 17, 1948, were served after the passing of the Act, and before the appointed day, and accordingly compensation falls to be assessed under s. 55 of the Act which adapts the provisions of s. 51 (concerning acquisitions after the appointed day) to the limited class of acquisitions between the passing of the Act and the appointed day.

By sub-s. 2 of s. 55 it is provided: "The value of any interest "in land which is compulsorily acquired as aforesaid shall be "ascertained by reference to prices current immediately before "the 7th day of January, 1947, and for that purpose the interest "shall be deemed to have been subsisting immediately before "that day subject to all incidents to which it is subject on the "date of the notice to treat, and the land shall be deemed to "have been immediately before the 7th day of January in the "same state as it is at the date of the notice to treat".

It is contended on behalf of the acquiring authority that one of the incidents to which the land was subject on June 17, 1948, was the risk that in two weeks' time, when the appointed day arrived, an enforcement notice might be served prohibiting the use of the land for movable dwellings in pursuance of the provisions of ss. 75 and 23 of the Act, and that such a risk was a matter which the official arbitrator was entitled to take into consideration in assessing the compensation.

By sub-s. 9 of s. 75 it is provided that the use of the land shall be deemed to have been begun in contravention of previous planning control, where at the material time the land was subject to a resolution to prepare a planning scheme, if begun otherwise than in accordance with permission granted in that behalf by or under the interim development order. On the facts of this case it is clear, and indeed it is admitted, that, unless the licence deemed to have been granted under the Public Health Act, 1936, amounts to such permission (a point with which we will deal hereafter) the claimant was in breach of previous planning control.

Sub-section 1 of s. 75, so far as it is material, provides that, where any use to which land is put on the appointed day was begun in contravention of previous planning control, "the pro-"visions of Part III of this Act" (which includes s. 23) "with "respect to enforcement notices shall apply in relation thereto

" as they apply in relation to development carried out after the " appointed day " without permission . . . " Provided that an " enforcement notice shall not be served by virtue of the provisions " of this section in respect of any works or use (not being works or " a use carried out or begun during the war period as defined by " the Building Restrictions (War-Time Contraventions) Act, " 1946) at any time after three years from the appointed day ".

On behalf of the claimant various points are taken. It is said, in the first place, that no enforcement notice could have been served when s. 75 came into force because there had been no breach of previous planning control in that the unconditional licence deemed to have been granted under s. 269 of the Public Health Act, 1936, amounted to planning permission. We do not think that such a proposition is tenable. As was pointed out by this court in *Pilling* v. *Abergele Urban District Council* (1), the Public Health Act, 1936, is concerned solely with matters relating to health and sanitation, and town planning considerations are outside the purview of that Act. The mere grant of a licence under s. 269 of that Act, even when granted by the local authority which is itself the planning authority, cannot amount to planning permission.

It is said, secondly, that no enforcement notice could have been served when s. 75 came into force, because under s. 23 no notice can be served after four years have elapsed since the development (which includes a change in the use of the land: see s. 12) was begun, and that this development was begun in the case of both sites well over four years before July 1, 1948. It is argued that sub-s. 1 of s. 75, in adapting the provisions of s. 23, preserves the limitation that any notice must be served within four years of the beginning of the change of use, and by its proviso adds a further limitation that such notice must also be given within three years of the appointed day. In other words, it is said that such a notice can only be served within three years of the appointed day if it is also served within four years of the beginning of the change of use.

The acquiring authority, on the other hand, contend that the second part of sub-s. 1, though in form a proviso, is providing a substituted and not an additional limitation. On the whole, we prefer this latter construction. It must be remembered that s. 23, which imposes a limitation of four years from the beginning of the change of use, is concerned with a change of use occurring after the appointed day, and that s. 75 is adapting in general terms the provisions of that section as a part of Pt. III of the Act to the circumstances of a change of use begun before the appointed day. The adaptation is itself stated to be " subject to

(1) [1950] 1 K. B. 636.

"the provisions of this section", and the proviso, which is part of the section, provides another limit.

In order to determine the question whether the proviso lays down a limitation in addition to or in substitution for that laid down in s. 23, we may derive some help, we think, from sub-ss. 2 and 3 of s. 75. These sub-sections are concerned with works carried out, or a use begun, broadly speaking, during the war, and if the claimant's argument is right, enforcement notices could only be served in respect of the limited number of works carried out or use begun since July 1, 1944. Moreover, it is relevant to observe that before the appointed day, when the Town and Country Planning Act, 1932, was repealed, and s. 75 came into force, the claimant was liable to have the user prohibited without compensation when a scheme was actually prepared.

It is further contended on behalf of the claimant that in any event the official arbitrator cannot take into account the possibility of such a notice being served, in that (1.) s. 75, sub-s. 6, expressly provides that where an enforcement notice has been served, the arbitrator is to take it into consideration, and that, accordingly, he is not by implication to take into consideration the possibility of its being served thereafter; and that (2.) in any event s. 75 had not become law at the date of the notices to treat.

As regards the first contention, it is to be observed that where land compulsorily acquired falls to be valued under s. 51 of the Act, the arbitrator is told to value on certain assumptions which are, broadly speaking, such as will ensure that the value is the existing use value. Where, therefore, an enforcement notice has been served, some express provision would be necessary to enable the arbitrator to depart from the existing use value, and s. 75, sub-s. 6, provides what is to happen. It says that he is to calculate the compensation "having regard to the requirements "of the notice and the assumptions required to be made for those "purposes shall be modified accordingly". That sub-section being clearly necessary to provide for such a case, we do not think that it can be argued that there is any implication from it that the possibility of a notice being served in the future must be disregarded.

As regards the second contention, it is true that s. 75 was not law at the date of the notices to treat, and that at that date there was no power to serve an enforcement notice under the Town and Country Planning Act, 1932, which was then in force, since the powers of enforcement under that Act were limited to the case where a scheme had been actually prepared. On the other hand, the claimant was in breach of previous planning control, and it was known that that section would come into force on July 1, 1948, and that then an enforcement notice could be served even though only a resolution to prepare a scheme had been passed.

We do not think that in these circumstances it can be said that as a matter of law the arbitrator is debarred from taking into consideration the possibility of such a notice being served. What weight he should attach to such a possibility, and the extent to which the value of the land should be diminished by that possibility may be difficult questions; but they are, of course, matters for him with which this court is not concerned.

This court therefore answers the first question in the affirmative. The second question accordingly does not arise. The compensation payable will be that set out in para. 1 of the award.

Solicitors: *Mortimer Silverman & Co. for James Barnes, Hayling Island; Lees & Co.*

P. B. D.

MINT v. GOOD.

[1948 M. 4048]

C. A.

1950
Nov. 16, 17.

Somervell, Denning and Birkett, L.JJ.

Negligence—Nuisance—Personal injuries—Boy on highway injured by collapse of wall—Wall separating forecourt of house from public highway—House let on weekly tenancy—No right to enter reserved by landlord—Right to enter to be implied—Liability of landlord.

The principle that a landlord, who has expressly reserved the right to enter the demised premises and do repairs, is liable in nuisance for injuries caused by the defective state of the premises to a person passing along the highway on which they abut, applies to cases where the landlord has impliedly reserved that right; and a term to that effect is normally to be implied in the contract of tenancy when the premises are let on a weekly tenancy.

The plaintiff, a boy, was injured by the collapse of a wall which separated the highway, on which it abutted, from the forecourt of a house owned by the defendant. The house was let on a weekly tenancy. No right to enter was expressly reserved by the owner. The trial judge found that the wall was a nuisance, and that its defective condition could have been ascertained with reasonable examination by a competent person, but that, as the owner had not specifically reserved the right to enter the premises, he was not liable for the injuries caused by the nuisance. On appeal by the plaintiff:—

Held, that a right to enter must be implied in the circumstances, and that the owner was liable for the injury caused by the nuisance.

Wilchick v. *Marks and Silverstone* [1934] 2 K. B. 56; *Wringe* v. *Cohen* [1940] 1 K. B. 229; and *Heap* v. *Ind, Coope & Allsopp Ld.* [1940] 2 K. B. 476, applied.

Sedleigh-Denfield v. *O'Callaghan*, [1940] A. C. 880, and *McCarrick* v. *Liverpool Corporation*, [1947] A. C. 219, distinguished.

APPEAL from Stable, J.

The plaintiff, Brian Mint, a boy of ten years of age, was on April 25, 1948, seriously injured by the collapse of a wall on to a public footpath, and he sued by his father as next friend for damages for personal injuries caused by an alleged nuisance. The wall in question was four feet in length and about two feet six inches in height. It abutted on the footpath, from which it separated the forecourt of two houses owned by the defendant, Mr. Good. The houses were both let on weekly tenancies, and the owner had not reserved to himself the right to enter the premises for the purpose of examination or repairs, although the evidence showed that he had in fact carried out repairs.

Stable, J., on May 3, 1950, found that the wall was in a technical sense a nuisance, and that reasonable examination by a competent person would have detected that it was in such a condition that it was liable to collapse at any moment. He dismissed the action, however, on the ground that the landlord was not liable because he had not specifically reserved the right to enter on the premises. The plaintiff appealed.

Sir G. Russell Vick, K.C., and *H. T. Buckee* for the plaintiff. On the facts as found by him the judge should have given judgment for the plaintiff. Where there is a proximity to the highway and the structure is in such a condition as to constitute a nuisance, the landlord cannot escape liability by praying in aid his own failure to reserve a right of entry. Where there is danger to the users of the highway the relationship of landlord and tenant is immaterial. The landlord has to take reasonable care to see that the premises are safe, and if they are not, he cannot escape liability to the public. In a weekly tenancy such as this the court will imply a right of entry by the landlord to do repairs. This court is bound by the decisions in *Wringe* v. *Cohen* (1) and *Heap* v. *Ind, Coope & Allsopp Ld.* (2).

[*Wilchick* v. *Marks and Silverstone* (3) and *Sedleigh-Denfield* v. *O'Callaghan* (4) also referred to.]

P. M. O'Connor for the defendant. It is submitted that Stable, J.'s decision is right. A landlord is not liable for non-repair of premises which are not in his occupation and over which he has retained no control. He can only have control either by some term, express or implied, in the contract of tenancy. He cannot, it is submitted, be liable for an action in nuisance if he does not know, and cannot reasonably know, of the existence of the nuisance. There is a finding that the defendant did not know. The test must be control. That is the origin of the doctrine in *Wilchick* v. *Marks and Silverstone* (5). If the landlord has no control he cannot be responsible. Where the landlord puts a tenant in occupation and does not reserve a right to enter the tenant is in exclusive possession against the whole world. Should the landlord enter he would be a trespasser: see *Stocker* v. *The Planet Building Society* (6).

---

(1) [1940] 1 K. B. 229.
(2) [1940] 2 K. B. 476.
(3) [1934] 2 K. B. 56.
(4) [1940] A. C. 880.

No distinction should be drawn between a weekly tenancy and one for a longer term. If the landlord wishes to reserve the right of entry he must stipulate for it, and such a right cannot be implied. *Wringe* v. *Cohen* (7) has been overruled by the principles laid down by the House of Lords in *Sedleigh-Denfield* v. *O'Callaghan* (8), where the duties of a landlord are clearly stated and he is held not to be liable if he has no knowledge of the nuisance: see also *McCarrick* v. *Liverpool Corporation* (9).

SOMERVELL, L.J. This appeal raises an interesting point, though a good deal of the argument was directed to a matter which I shall have to consider later, and that is whether certain decisions, prima facie binding on this court, could be disregarded or overruled having regard to the principles laid down in *Young* v. *Bristol Aeroplane Co. Ld.* (10).

[His Lordship referred to the facts, and continued:] The judge found that there was a nuisance, and (although this may not matter in view of the law as I think it has been laid down and is binding on this court) that a reasonable examination would have detected those defective conditions. It was not a latent defect: it was due to lack of repair. There was no contract by the landlord, as between himself and his tenant, to do any repairs, and there was no obligation on the tenant to do them. The judge held that the landlord was not liable because he had not specifically reserved the right to enter on the property.

In *Heap* v. *Ind, Coope & Allsopp Ld.* (11), proceedings were brought against a landlord in somewhat similar circumstances, in nuisance for injury on a highway. The headnote states this: "In order that a person injured while proceeding along a highway by the defective condition of premises alongside it may be entitled to sue the landlord instead of the occupying tenant

---

(5) [1934] 2 K. B. 56.
(6) (1879) 27 W. R. 877.
(7) [1940] 1 K. B. 229.
(8) [1940] A. C. 880.
(9) [1947] A. C. 219.
(10) [1946] A. C. 163.
(11) [1940] 2 K. B. 476, 483.

"for personal injuries, it is not necessary that the landlord "should have covenanted with the tenant to do the external "repairs; it is sufficient that he has reserved the right to enter "on and view the premises and to do all necessary repairs".

The judgment of the court was given by Mackinnon, L.J., who said (11): "It was held by Goddard, J. (as he then was) "in *Wilchick* v. *Marks and Silverstone* (12) that, where a third "party had been injured by the lack of repair of a house, and "the landlords had not covenanted to do the repairs but had "reserved the right to enter and do the repairs if they thought "fit, that was sufficient to give the third party who had been "damaged a direct right of action against the landlord, and he "was not limited to a right against the occupier. Goddard, J., "added a proviso to that suggested rule of liability, that it "could only arise in a case where the landlord knew, or had "notice of, the defect or lack of repair in the property in "question. That qualification or condition, that the landlord "must know that repairs are wanted or that the defect is existing, has, I think, been said to be incorrect in the later case "of *Wringe* v. *Cohen* (13). If that qualification is taken away, "then the decision of Goddard, J. (otherwise, I think, approved "in this court) seems to me to cover the position of Messrs. Ind, "Coope & Allsopp Ld. in the present case.

"Goddard, J., said this: 'If I use a highway the duty I "'am under not to injure other persons is not special or con"'tractual, but general, arising from what Lord Esher used "'to call proximity. A property owner knows that his house "'if not repaired must at some time get into a dangerous state; "'he lets it to a tenant and puts him under no obligation to "'keep it repaired; it may be the tenant is one who from lack "'of means could not do any repairs. The landlord has expressly "'reserved to himself the right to enter and do necessary repairs: "'why then should he be under no duty to make it safe for "'passers-by when he knows that the property is dangerous? "'The proximity is there: he has the right to enter and remedy "'a known danger. Is the injured person to be left in such a "'case only to a remedy against the tenant?'

"That passage, in view of the later expression of opinion in "*Wringe* v. *Cohen* (14), has to be read omitting the words which "I read: 'When he knows that the property is dangerous'. If "you omit those words, that statement of the learned judge "exactly covers the position in this case. 'The landlord has "'expressly reserved to himself the right to enter and do neces"'sary repairs: why then should he be under no duty to make

(11) [1940] 2 K. B. 476, 483.
(12) [1934] 2 K. B. 56.
(13) [1940] 1 K. B. 229.
(14) [1940] 1 K. B. 229.

" ' it safe for passers-by? '—like Mr. Heap—' The proximity is " ' there: he has the right to enter and remedy a danger. Is " ' the injured person to be left in such a case only to a remedy " ' against the tenant? ' "

That decision, of course, binds this court unless it is inconsistent with some other decision or cannot stand with some decision of the House of Lords; and I propose to proceed on the basis, in the first instance, that this is a decision binding on this court. The important words are, for the purpose of this case, " the landlord has expressly reserved to himself a right to enter ". No such right to enter was expressly reserved in this case.

We are concerned here with weekly tenancies, and the informality with which such tenancies are usually inaugurated has been frequently commented on, not adversely, but as a fact. There is always, or should be, a book in which periodically payments of rent are receipted, and such a book sometimes contains printed matter at the beginning. Very often not, however, and no one suggests here that that printed matter was made the basis of the terms of the original contract of tenancy. A book issued after the events which had happened in this case was accidentally put in. It appears that the landlord had substituted a book with a new set of conditions, including a condition which, if it had been in the book at the time of the events which happened in this case, would have brought him within *Heap* v. *Ind, Coope & Allsopp Ld.* (15). I do not think, therefore, that we should have any particular regard to the provisions which were in the rentbook at the material time, though I do not think there is anything in them which would prevent the implication of the terms which I, as will be seen in a moment, think must be implied in the circumstances of this case.

Mr. O'Connor referred to the words " the landlord has expressly reserved to himself ". It seems to me that the same principle must apply if a landlord has impliedly reserved to himself the same right. I cannot see any principle by which a landlord should be in one position in the case of an express reservation, and in a different position in the case of an implied reservation. The question, therefore, would be whether, in the circumstances as stated, a right to enter on and view the premises and do necessary repairs is to be implied. I would have said that, in the absence of evidence which excluded it, there is no term which would be more easily and more necessarily implied by law in a tenancy of this kind than a right in the landlord to enter, or to re-enter, to examine the premises and to do necessary repairs. It must be in the contemplation of both parties to such a weekly tenancy that the tenant will not be called upon to do repairs. The Rent Restriction Acts have rather altered the position; but in the old days it would have been absurd for either side to contemplate that a man who was only a weekly tenant should be called upon to do repairs. Both sides, I think, must contemplate as the basis of the contract that the house will be kept in reasonable and habitable condition; that that will be done by the landlord and not by the tenant; and, although he does not bind himself to do so, that he will have the right to enter and look after his own property by doing repairs.

---

(15) [1940] 2 K. B. 476.

Mr. O'Connor has referred to a case on another part of his argument which contains a statement by Lord Porter with regard to weekly tenancies which I think is useful. It bears out the line of approach which I have just indicated, although not with regard to the subject-matter with which we are concerned here. The case is *McCarrick* v. *Liverpool Corporation* (16). The House of Lords were considering the construction of the Housing Act, 1936, which put on the landlord a liability to repair in certain circumstances, and the question was whether he came under any liability until he had notice. In the course of his speech Lord Porter said: "In construing this statute its exact "terms must be considered. It does not impose extraneously "a duty upon the landlord, it merely inserts a term into the "tenancy agreement, and this term then becomes part of the "contract between the parties, whether they wish it or not. "In such a tenancy there is no reason why any term should not "be implied, provided it is necessary to secure the business "efficacy of the contract and it is not contrary to the provisions "of the Act".

As I have said, in the case of a weekly tenancy, business efficacy certainly will not be effected if the house is allowed to fall into disrepair and no one keeps it in reasonable condition; and it seems to me, therefore, necessary for business efficacy that the landlord should have the right which I have defined. I think that that receives additional support from the facts of this case which, on a mere consideration of the ordinary position as between landlord and tenant, might be overlooked.

This house, or, rather, the wall of its forecourt, adjoins a highway. Many houses adjoin other land, and the principles of liability in such a case may be the same. Any house which, as this house had, has something about it which may become a nuisance adjoining the highway, will render the occupier prima facie liable if the nuisance causes damage; and that gives the occupier another reason for desiring that the landlord should at any rate have the power to keep the place in proper repair and so prevent his becoming liable to passers-by for nuisance.

---

(16) [1947] A. C. 219, 224.

That is the conclusion to which I would have come in the absence of authority, and I asked Mr. O'Connor what was the best authority he could find to suggest that I am wrong. He referred to *Stocker* v. *The Planet Building Society* (17). The headnote states: " A lessor who, in the absence of express power " in the lease, enters upon the demised premises to repair them " on breach of the lessee's covenant to repair, even though under " a superior lease the lessor is liable to forfeiture for non-repair " and though he enters by leave of weekly sub-tenants, commits " a trespass which will be restrained by injunction ".

It is plain that in that case the lease was in writing, and that it contained covenants concerning repair, usual, no doubt, in a lease of that length, the tenant having the liability to repair. There was a power of re-entry on breach, but no power for the lessor to do repairs on the tenant's default. James, L.J., said: " Where a reversioner has granted a lease with no power of " re-entry reserved on breach of a covenant to repair, can he " give himself the right to enter and do the repairs? It is a plain " invasion of the rights of property. He has no more right than " any stranger has " (17).

I agree that the landlord cannot enter if he has not expressly or impliedly the right to do so. I am not considering cases of longer leases, or cases where there are written documents expressly covering repair and re-entry, particularly if they are in conveyancing terms; nor, of course, am I considering all weekly tenancies. There may be evidence in the case of a weekly tenancy that the parties had contracted on the basis of terms which either would exclude the implication which I make in this case, or make it more difficult; but, there being no authority which prevents its being implied in a case of this kind, the implication seems to me right, applying the ordinary principles of implication.

The evidence shows that the landlord had previously done repairs but I do not think that it would be right to base a conclusion on that, for it might be done by licence; and, whether there was a right of re-entry or not, the occupying tenant would be very unlikely to seek to prevent the landlord's putting the house into better condition. So much for the first point, assuming that *Wringe* v. *Cohen* (18), is applicable, and also that it binds this court.

Mr. O'Connor, however, submits, in view of two decisions on which he relies, and on the basis of what he submits are certain inconsistencies in *Wringe* v. *Cohen* (18), that we should not regard ourselves as bound by either that case or *Heap* v. *Ind,*

---

(17) 27 W. R. 877, 878.

(18) [1940] 1 K. B. 229.

Coope & Allsopp Ld. (19). There was a long considered judgment in *Wringe* v. *Cohen* (20), reviewing a number of authorities. The headnote thus sets out the facts concisely: " If, owing to want of " repair, premises on a highway became dangerous and constitute " a nuisance, so that they collapse and injure a passer-by or an " adjoining owner, the occupier or owner of the premises, if he " has undertaken the duty to repair, is answerable whether he " knew or ought to have known of the danger or not ".

Mr. O'Connor submits that this case must proceed on the basis that the landlord neither knew, nor ought to have known, and that therefore if *Wringe* v. *Cohen* (20), is wrong the defendant in this case should not be held liable. I will first consider the internal criticisms. Mr. O'Connor submitted, I think rightly, that there is probably a mistake in a reference to a note in Pollock on Torts (4th ed.), p. 239; but the judgment, of course, does not base itself solely on that. He submitted (and I did not think that there was much force in it) that the court had not really understood the ratio of the decision of Blackburn, J., in *Tarry* v. *Ashton* (21). In any event, I do not think that these are the sort of grounds—even if they were substantiated, and I do not think they were—which would entitle us to disregard this decision. It is a plain decision, laying down plain principles; and even if it could be shown that in reviewing the authorities to see whether any of them were inconsistent with the principle being laid down there had been some misunderstanding in some earlier case, that would not affect the matter. Apart from the note in Pollock on Torts, Mr. O'Connor did not satisfy me that there was any misunderstanding of anything.

Then Mr. O'Connor said that *Wringe* v. *Cohen* (22) could not stand with the decision of the House of Lords in *Sedleigh-Denfield* v. *O'Callaghan* (23). That case concerned a different type of nuisance, and the distinction has been pointed out in more than one passage in the authorities which have been cited to us. In *Wringe* v. *Cohen* (24) the nuisance arose from a failure to maintain property in repair, whether one is considering the tenant or the landlord. There is another class of nuisance case, of which *Sedleigh-Denfield* v. *O'Callaghan* (25) is an example, where the nuisance originally comes into existence by the act of a trespasser; and the question there was in what circumstances, that having happened, the occupier became liable.

It seems to me that those two different classes of case may raise different principles. One has only to study them to see that one class may fall on one side of a line, and the other class on the other. It seems obvious, in the case of a nuisance created by a trespasser, that it would be very hard if the occupier were held liable half-an-hour afterwards if he had had no opportunity of knowing, and in fact had no knowledge, of the existence of any danger. Therefore, having regard to its subject-matter, I do not think that *Sedleigh-Denfield* v. *O'Callaghan* (26) could possibly be treated by this court as overruling *Wringe* v. *Cohen* (27).

---

(19) [1940] 2 K. B. 476.
(20) [1940] 1 K. B. 229.
(21) (1876) 1 Q. B. D. 314.
(22) [1940] 1 K. B. 229.
(23) [1940] A. C. 880.
(24) [1940] 1 K. B. 229.
(25) [1940] A. C. 880.

We were referred to a number of passages in the speeches of their Lordships in *Sedleigh-Denfield* v. *O'Callaghan* (26). I do not propose to refer to them, because I think that the nature of the subject-matter makes it impossible for Mr. O'Connor to rely on them as he did. Lord Atkin, however, in considering the general law on nuisance, said that there must be some degree of personal responsibility; a statement which, I think, may well cover *Wringe* v. *Cohen* (28), for if a man has an obligation to repair property abutting on a highway he may well be said to have some degree of personal responsibility for seeing that it does not get into such a condition that it injures people using the highway. I am not saying that there are not some passages in the speeches which counsel might usefully quote if the point in *Wringe* v. *Cohen* (28) ever came before the House of Lords; but that is not enough to enable this court to say that it must be treated as overruled.

The other case on which Mr. O'Connor particularly relied was *McCarrick* v. *Liverpool Corporation* (29). There, again, the court was concerned with a completely different subject-matter, namely, the position as between landlord and tenant, a statute having imposed obligations on the landlord in circumstances where they were not already imposed by the contract of tenancy. It was held that the landlord required notice. Mr. O'Connor submitted that it would be illogical if the tenant could not make any claim in respect of damage for want of repair unless the landlord had notice, but that a user of the highway could. I do not myself see any illogicality in that. Even if there is illogicality it would not, in my view, entitle us to disregard *Wringe* v. *Cohen* (30). At the highest it would be an argument on illogicality which could be addressed to the House of Lords in the event of their ever being asked to consider what was laid down in *Wringe* v. *Cohen* (30). Therefore Mr. O'Connor has failed to satisfy me that we have anything else to do than to apply the law as laid down in *Wringe* v. *Cohen* (30) and *Heap* v. *Ind, Coope & Allsopp Ld.* (31).

(26) [1940] A. C. 880.
(27) [1940] 1 K. B. 229.
(28) [1940] 1 K. B. 229.
(29) [1947] A. C. 219.
(30) [1940] 1 K. B. 229.
(31) [1940] 2 K. B. 476.

C. A.
1950
MINT v. GOOD.
Somervell, L.J.

The judge first of all took the view, having read *Heap* v. *Ind, Coope & Allsopp Ld.* (31), that there was no reservation by the landlord. He said: "In this case I am quite satisfied that the "landlord had reserved no right to enter on either No. 193 or "No. 195 for the purpose of doing repairs, or, indeed, for any "purpose at all". That is where I part company with him. We, no doubt, have had the benefit of a second and valuable argument, and for the reasons which I have given I think that this right is to be implied.

In those circumstances, it becomes unnecessary to consider a further point which was raised under s. 16, sub-s. 2, of the Rent Restriction Act of 1920.

The only other question is that of damages. The judge awarded the plaintiff for pain and suffering 100*l.*, plus agreed special damages. I see no reason for interfering with that award. The appeal must be allowed.

DENNING, L.J. The law of England has always taken particular care to protect those who use a highway. It puts on the occupier of adjoining premises a special responsibility for the structures which he keeps beside the highway. So long as those structures are safe, all well and good; but if they fall into disrepair, so as to be a potential danger to passers-by, then they are a nuisance, and, what is more, a public nuisance; and the occupier is liable to anyone using the highway who is injured by reason of the disrepair. It is no answer for him to say that he and his servants took reasonable care; for, even if he has employed a competent independent contractor to repair the structure, and has every reason for supposing it to be safe, the occupier is still liable if the independent contractor did the work badly: see *Tarry* v. *Ashton* (32).

The occupier's duty to passers-by is to see that the structure is as safe as reasonable care can make it; a duty which is as high as the duty which an occupier owes to people who pay to come on to his premises. He is not liable for latent defects, which could not be discovered by reasonable care on the part of anyone, nor for acts of trespassers of which he neither knew, nor ought to have known: see *Barker* v. *Herbert* (33); but he is liable when structures fall into dangerous disrepair, because there must be some fault on the part of someone or other for that to happen; and he is responsible for it to persons using the highway, even though he was not actually at fault himself. That principle was laid down in this court in *Wringe* v. *Cohen* (34), where it is to be noted that the principle is confined to "premises on a highway",

---

(31) [1940] 2 K. B. 476.

(32) (1876) 1 Q. B. D. 314.

(33) [1911] 2 K. B. 633, 645.

(34) [1940] 1 K. B. 233.

C. A.
1950

MINT
v.
GOOD.

Denning, L.J

and is, I think, clearly correct in regard to the responsibility of an occupier to passers-by.

The question in this case is whether the owner, as well as the occupier, is under a like duty to passers-by. I think that in many cases he is. The law has shown a remarkable development on this point during the last sixteen years. The three cases of *Wilchick* v. *Marks and Silverstone* (35), *Wringe* v. *Cohen* (36), and *Heap* v. *Ind, Coope & Allsopp Ld.* (37), show that the courts are now taking a realistic view of these matters. They recognize that the occupying tenant of a small dwelling-house does not in practice do the structural repairs, but the owner does; and that if a passer-by is injured by the structure being in dangerous disrepair, the occupier has not the means to pay damages, but the owner has, or, at any rate, he can insure against it. If a passer-by is injured by its falling on him, he should be entitled to damages from someone, and the person who ought to pay is the owner, because he is in practice responsible for the repairs. This practical responsibility means that he has de facto control of the structure for the purpose of repairs and is therefore answerable in law for its condition. Parliament has long made owners responsible under the Public Health Acts for nuisances arising from defects of a structural character: see s. 94 of the Public Health Act, 1875, and s. 93 (*b*) of the Public Health Act, 1936; and the common law now also in many cases makes them responsible for public nuisances due to the disrepair of the structure.

This seems to me to be a logical consequence of the cases to which we have been referred. In *Wilchick* v. *Marks and Silverstone* (38) the landlord had covenanted to repair; in *Heap* v. *Ind, Coope & Allsopp Ld.* (39), he had not covenanted to repair, but had reserved a right to enter. In the present case he has not reserved a right to enter, but he has in practice always done the structural repairs. I cannot think that the liability of the owner to passers-by depends on the precise terms of the tenancy agreement between the owner and the tenant, that is to say, on whether he has expressly reserved a right to enter or not. It depends on the degree of control exercised by the owner, in law or in fact, for the purpose of repairs. If a landlord is liable when he reserves an express right to enter, he is also liable when he has an implied right; and even if he has no strict right, but has been given permission to enter whenever he asked, it should make no difference. The landlord has in practice taken the structural repairs on himself and should be responsible for any disrepair.

---

(35) [1934] 2 K. B. 56.
(36) [1940] 1 K. B. 229.
(37) [1940] 2 K. B. 476.
(38) [1934] 2 K. B. 56.
(39) [1940] 2 K. B. 476.

That is sufficient for the decision of this case, but I venture to doubt whether in these days a landlord can in all cases exempt himself from liability to passers-by by taking a covenant from a tenant to repair the structure adjoining the highway. I know that in *Pretty* v. *Bickmore* (40) a landlord managed to escape liability for a coal-plate which was, at the beginning of the lease, in dangerous disrepair, because he took from the tenant a covenant to repair. I doubt whether he would escape liability today. Again, suppose that a landlord of small houses took from weekly tenants a covenant to repair the structure, and then did not trouble to enforce the covenant or to repair himself? Could he escape liability by so doing? I doubt it. It may be that in such cases the landlord owes a duty to the public which he cannot get rid of by delegating it to another. These questions do not however arise here because there was no such covenant. In this case the judge found that the condition of the wall was a nuisance, and that a reasonable examination of the wall by a competent person would have detected the condition in which it was. That means that the duty of the landlord was not fulfilled. His duty was to see that the structure was as safe as reasonable care could make it. It was not so safe.

I agree, therefore, that the appeal should be allowed, and judgment entered accordingly.

BIRKETT, L.J. I agree. In the course of the argument yesterday Mr. O'Connor conceded that, save for one matter, the facts in this case were on all fours with those in *Heap* v. *Ind, Coope & Allsopp Ld.* (41). The one matter which differentiated this case from that was that there the landlord had expressly reserved to himself the right to enter upon the premises at any time for the purpose of repair. Here there was no such term, quite clearly, and it was on that point that the decision in the court below turned. Stable, J., expressly decided the case upon that matter.

I understood Mr. O'Connor also to agree that if, in fact, that obstacle—namely, that in the present case there was no express reservation—could be got over, then, indeed, this case would be on all fours with *Heap* v. *Ind, Coope & Allsopp Ld.* (41), with the consequence that that case, which is binding on this court, would be fatal to his contention. I am of opinion that in this case that obstacle is overcome by implying a term giving the right of entry. My Lord gave in detail the reasons why that appears in this case to be a necessary implication, and it is enough for me to say that I fully agree with him. That being so, the

(40) (1873) L. R. 8 C. P. 401.

(41) [1940] 2 K. B. 476.

only difference between the present case and *Heap* v. *Ind, Coope & Allsopp Ld.* (41), is removed.

I fully agree with the two judgments which have already been delivered.

Appeal allowed.

Solicitors: *Halliday & Co.; Hewitt, Woollacott & Chown.*

A. W. G.

BROCK *v.* RICHARDS.

[Plaint No. F. 37]

C. A.
1950
Nov. 30;
Dec. 1, 19

Evershed, M.R., Singleton, L.J., and Vaisey, J.

Negligence—Highway—Horse jumping over hedge on to cyclist—Liability of owner.

It must be taken as clearly established by authority that there is no obligation on the owner or occupier of a field adjacent to a highway to maintain a fence on the border of the highway. The law is founded upon ancient social conditions and is in no way related to, or liable to be qualified by, such matters as the relative levels of field and highway, the nature of the highway or the amount of traffic on it. It follows, there being no liability to fence at all, that liability does not arise because there is a fence which is not properly maintained. It is also established that, save in cases concerning animals of peculiar characteristics, there is no general duty, founded on the principle in *Donoghue* v. *Stevenson,* [1932] A. C. 562, upon the owner of domestic animals to take steps to prevent them from straying on to the highway and so causing risk of accidents to users of the highway.

The exceptional class of case where the owner of an animal is under a duty to take steps to prevent it from endangering the public on the highway is limited to the case where the animal is "vicious" or "mischievous". The word "vicious" as applied to animals connotes a savage disposition, a propensity to attack people. An animal which, though not savage, is dangerous because of its frolicsome behaviour must equally be taken to have propensities against which, if he knows them, the owner has a duty to guard. The basis of liability is not that the animal by its mere presence on the highway may cause an obstruction but that such an animal, when on the highway and therefore likely to meet passers-by, is known to be liable to indulge its dangerous propensities. A special proclivity towards straying known to the owner cannot be regarded

C. A.
1950

BROCK
v.
RICHARDS.

as such a special characteristic as of itself to impose liability on him.

The plaintiff was riding a motor bicycle in the evening along a main road. As he was passing a field owned by the defendant, which was on a higher level than the road, a mare belonging to the defendant leapt over or through the hedge bordering the highway and landed on the tank of the machine. In the plaintiff's action for damages, the county court judge held that the mare was not vicious or mischievous, but that, as the defendant knew that she had a propensity to stray, his failure to prevent her getting on to the highway amounted to negligence. On appeal by the defendant:—

Held, that, having regard to the finding of the county court judge that the mare had no particular characteristics which rendered her dangerous when on the highway, the appeal must be allowed.

Searle v. *Wallbank*, [1947] A. C. 341, followed.

APPEAL from Judge Rawlins, sitting at Newquay county court.

The plaintiff, Wesley Frederick John Brock, claimed damages from the defendant, R. J. Richards, for negligence in failing to keep a mare under proper control. The following statement of facts is taken from the judgment of Evershed, M.R.:—In the evening of January 13, 1950, the plaintiff was riding his motor-bicycle along the main road from St. Austell to Newquay, and as he was passing a field owned or occupied by the defendant, which was on a higher level than the highway, a black mare belonging to the defendant leapt over or through the hedge bordering the highway and (according to the plaintiff's evidence) landed on his tank. The plaintiff was supported by two witnesses, a farmer and a farm labourer. There was in the testimony of these two witnesses enough, beyond doubt, to support a finding that the mare (which though over five years old had never been broken) was at least of a " mischievous " nature. Thus, although she did not appear ever to have bitten or injured anyone—and the plaintiff's evidence that the mare had kicked him appeared to have been wrong—she was nevertheless said to possess the curious and alarming habit of dashing towards a human being " with mouth abroad " and then stopping some two or three yards short. The farmer stated that she would try to bite or kick anyone who tried to catch her when straying on the road. On the other side was the evidence of the defendant, his wife, a stableman, and a veterinary surgeon. All these witnesses gave the mare a good character, free from vice and bad temper; though the defendant's wife, who plainly regarded the animal with affection, conceded, in answering a question put to her by the judge, that she was different from other horses and was " rather " temperamental ".

C. A.
1950

BROCK
v.
RICHARDS.

The county court judge found as a fact that the mare had a sweet nature and was in no way dangerous, and that her only unusual characteristic was her propensity to stray.

The material part of the county court judge's judgment was as follows:—"To succeed in this action the plaintiff must show "either that the animal was vicious or dangerous or, alternatively, "that special circumstances existed which take the case out of "the ordinary rule of law that domestic animals can wander at "large without liability being incurred by their owner. . . . This "horse was unbroken and by that I mean it had never been "used for any form of work. It was specially looked after by "the defendant's wife. It was fed specially, grazed specially and "housed specially. The defendant's wife says that it has a sweet "nature and is not in any way dangerous. I entirely accept "that evidence. It has been suggested that the mare was "different from other mares, but in my opinion it is not "uncommon that different mares should have different temperaments. This mare liked to be free and get about on its own. "The defendant's wife knew that it would get out of any field "in which it was put, and that nothing would stop it. On one "or two previous occasions it had got out on to the highway. She "knew that nothing could prevent this, and I am satisfied that "the defendant knew it also. On one occasion the mare strayed "into the garden of a house occupied by the witness Mr. Giles. "On another occasion the mare was seen on the highway and "difficulty was experienced in catching her. The defendant "knew that special precautions were necessary or it would get "out on to the high road. On the day of the plaintiff's accident "the field near the highway was not the field in which the mare "was grazing. The mare had been put in one of two or three "inter-communicating meadows and there left to graze. She "got through the hedge or gate of these meadows by some means "into the ploughed field.

"Mr. Spooner [counsel for the defendant] says that nobody "should have anticipated that it could do this. He says, therefore, that special circumstances do not exist in this case. In "my view it does not matter what field the mare came from. "Once it is established that it was likely to get on the highway "precautions should have been taken to stop it getting out. Mr. "Spooner further says that before the defendant could be found "negligent you must find that he owed a duty to the plaintiff. "I am of the opinion that in certain circumstances the owner of "land adjoining the highway may owe a duty to users of the "highway. The question arises as to whether the possibility of "damage should have been contemplated by the parties in this "case. Mr. Spooner says that the damage is so remote that it "could not be in the reasonable contemplation of the parties.

"He cites *Searle* v. *Wallbank* (1), particularly the judgment of "Lord Maugham.

"In the present case, when the defendant knew the volume "of traffic passing on the highway, it is ridiculous to say that "no danger would have resulted if the horse were to stray. The "possibility of damage must therefore have been present in the "owner's mind. It is therefore impossible to say that the damage "was too remote. The next question arising is whether the "defendant is negligent. He knew the animal's propensity to "stray because it had done so on previous occasions. He knew "that if left in the field it would display that propensity again. "His failure to prevent the animal getting on the highway "amounts to negligence. I find therefore that in this case there "are special circumstances which take it out of the general "rule laid down in *Searle* v. *Wallbank* (1). I find that the "plaintiff has established negligence on the part of the defendant "and that there was no contributory negligence on the part of "the plaintiff. The plaintiff is therefore entitled to succeed".

The county court judge gave judgment for the plaintiff for 28*l.* 11*s.* 8*d.*, agreed to be a fair compensation for the plaintiff's personal injuries and for the damage to his motor bicycle and clothing. The defendant appealed.

John Thompson and *Gazdar* for the defendant. There is no ground for saying that the defendant is liable to the plaintiff for the injury caused to him by the mare's leaping over the fence of the field she was in. The mare had a natural propensity to stray but it does not follow that as a result she became dangerous. It is to provide against this natural propensity that fences and hedges are put round fields, and there is no finding here that the fences were inadequate. The mare was kept for show purposes and had not been trained. The only thing special to her was her unusual tendency to stray. Many animals have the same propensity. The county court judge was therefore wrong in holding that there was a breach of duty on the part of the defendant, such as there would be in the case of a wild animal or an animal that had developed a cruel or mischievous propensity. A wish to stray in a horse is not a sign of cruelty any more than in the case of sheep. The straying by the mare was more a matter of curiosity.

The case resembles *Searle* v. *Wallbank* (1), where it was held by the House of Lords that the owner was under no duty to users of a highway to prevent his animals not known to be dangerous from straying on to it. Therefore there was here no duty on the defendant to place special restraint on the mare. To be dangerous, she must be known to have a tendency to attack people. All the evidence here is that she jumped over the hedge out of a desire to stray and not from an intention to injure; and the circumstances here were most unusual.

---

(1) [1947] A. C. 341.

[SINGLETON, L.J. If the tendency to jump into the highway were known, would not the owner owe a duty to anyone passing along the highway?]

Not unless the animal were known to attack persons using the highway. The judge has found that this mare was not a dangerous or mischievous animal. All that the defendant knew against her was that she had a marked propensity to jump out of any field in which she was. That does not make her mischievous. [They referred to *Deen* v. *Davies* (3), *Jones* v. *Lee* (4).]

Charles Lawson for the plaintiff. Each case depends on its own facts. It is not contended that the defendant is liable because of the mare's propensity to stray. The defendant put her in a field on a higher level than the highway. He must have known that, in order to get out of the field, she would jump down on to the highway and that in doing so she was liable to injure persons on the highway. It was negligence to put the mare in a field from which, if she escaped, she was liable to injure persons on the highway. There is a difference between an animal straying on to a highway and one which jumps on to a highway. There is no case in which the owner has not been held liable when an animal jumped on to the highway. The general principle that a landowner is not liable for the consequences of an animal's straying on to a highway should not be extended to cover an animal which has a mischievous propensity to jump. A man may be liable for negligence through animals: Winfield on Torts (5th ed.), pp. 510, 515; *Wright* v. *Callwood* (5). It is submitted that where an animal has such peculiar characteristics as this mare, the owner is under a special duty to take care. The evidence establishes that this mare was of a frolicsome disposition and prone to jump. She was likely to do damage to persons using the highway, and the defendant was under a duty to prevent her escape. He negligently failed to keep her in, and he is liable for the damage caused by her escape: *Turner* v. *Coates* (6). The defendant's knowledge of the peculiar propensities of his mare created a duty to take care.

Gazdar in reply. The only finding of fact against the mare was that she was a persistent strayer. The degree of straying or the fact that she jumped does not impose any extraordinary liability on her owner.

Cur. adv. vult.

---

(3) [1935] 2 K. B. 282.
(4) (1911) 106 L. T. 123.
(5) [1950] 2 K. B. 515.
(6) [1917] 1 K. B. 670.

December 19. The following judgments were read:—

EVERSHED, M.R., stated the facts substantially as set out above, and continued:—It follows from the judgment of the judge that he was of opinion that a special propensity to stray and knowledge of that fact by the defendant was a sufficient special circumstance (having regard to the nature of the highway adjoining the defendant's land and the extent of the traffic upon it) to take the case out of the general rule stated in *Searle* v. *Wallbank* (7) and to impose upon the defendant the duty of taking reasonable care to prevent the mare's indulging her propensity and leaping or otherwise escaping into the road. If the premise is correct, it is not, I think, in dispute that the defendant failed to take the steps which his duty imposed upon him, and that the plaintiff is entitled to maintain his judgment. I have felt no little anxiety upon the matter, and I confess to a reluctance, in an action for damages assessed at 28*l*. 11*s*. 8*d*., to interfere with the judgment of the court below. But I have felt compelled to conclude that the judge's award was based on an erroneous premise and, accordingly, that it cannot stand.

In *Searle* v. *Wallbank* (7), the House of Lords had been invited to consider, in the light of modern conditions and of certain critical doubts which had been expressed by members of this court, the law as it affected persons who keep animals on fields adjacent to the highway. On that occasion all the cases were referred to which have been cited to us. The House had no difficulty in affirming the law as it had previously been understood. It must now be taken to be clearly established that there is no obligation on the owner or occupier of a field adjacent to a highway to maintain a fence on the border of the highway. And it is clear, in my judgment, that the law is founded upon our ancient social conditions and is in no way related to, or liable to be qualified by, such matters as the relative levels of fields and highway, the nature of the highway, or the amount of traffic upon it.

Secondly, it is equally established that, save in cases concerning animals of peculiar characteristics to which I will later refer, there is no general duty founded on the principle formulated in *Donoghue* v. *Stevenson* (8) upon the owner of domestic animals to take steps to prevent them from straying on to the highway and so causing risks of accidents to users of the highway. Both propositions are clearly stated by Lord Maugham in *Searle* v. *Wallbank* (9). And it follows, in my judgment, no less clearly from the speeches in the House that, there being no liability

(7) [1947] A. C. 341.
(8) [1932] A. C. 562.
(9) [1947] A. C. 341, 345, 347.

to have a fence at all, liability does not arise because there is a fence which is not properly maintained. The point is thus stated by Lord du Parcq (10): "I should have thought that, on "principle, where there is no duty to maintain a fence at all "it cannot be a breach of duty to maintain one which is im- "perfect". A contrary view would indeed lead to strange results. For since the maximum danger to passers-by on the road might be said to be incurred where an animal leaps over or breaks through a fence at the point where it just fails to offer sufficient obstruction, it would appear to follow that the occupier's liability would vary inversely with the condition of his fence, up to the point where the fence was just insufficient to prevent a strong animal leaping over it and at that point it would be at its maximum.

There remains, however, the exceptional class of case, where the animal in question is known to have such characteristics as to impose upon its owner a duty to take steps to prevent it from endangering the public by getting on to the highway and there exhibiting its characteristics to the danger of users of the highway. In so stating the nature of the exceptional class of case I have, I believe, formulated it correctly. But before passing to consider the facts in the present case as found, and to determine whether they are such as to have imposed liability upon the defendant, I draw attention to one important matter of fact in *Searle* v. *Wallbank* (11) which has, in my judgment, an important bearing upon this case. In *Searle* v. *Wallbank* (11), the cyclist had been injured as a result of a collision in the dark with a horse, the conditions being made more difficult by the then prevalent black-out regulations. But it is far from clear whether the accident was due to the fact that the cyclist ran into the horse through being unable in the dimmed lighting conditions to see it or whether (as in the present case) the horse dashed out of a gap in the hedge or leapt down upon the cyclist so that the accident was and would have been inevitable whatever the lighting conditions and however alert the cyclist had been.

Thus, Lord Porter said (12): "It is not clear from the "evidence whether the horse dashed across the road and collided "with the appellant or whether, because of the dimness of his "lights, he failed to see it and ran into it. I do not think it "material to determine which version is the true one but, if it "had to be decided, the former version appears the more likely". Lord Porter further observed: "If, as may be the case, the "horse came down from the bank on top of the cyclist, the

---

(10) [1947] A. C. 341, 361.
(11) Ibid. 341.
(12) Ibid. 354.

"accident was an unusual one . . .". It is clear from the opinion of Lord Porter, as it is also clear from that of Lord du Parcq, that it mattered not which of the alternative hypotheses of fact was accepted. For it is, in my judgment, plain that (apart from questions of special propensities to be noted hereafter) the owner of the animal is not rendered liable because the animal leaps over or through the hedge or otherwise down upon the user of the highway. This conclusion also emerges from this dictum quoted with approval by Lord du Parcq (13) of Holt, C.J., and Turton, J., in *Mason* v. *Keeling* (14): "If the "owner puts a horse or an ox to grass in his field, which is "adjoining to the highway, and the horse or the ox breaks the "hedge, and runs into the highway, and kicks or gores some "passenger, an action will not lie against the owner; otherwise "if he had notice, that they had done such a thing before". Again Lord du Parcq says (15): "Moreover, the suggested duty "could only be to take reasonable care to maintain a reasonably "secure fence, and it must be a very high fence which a horse "cannot jump".

From all this it follows in my opinion that (apart always from the case of special propensities) liability is not imposed on the owner of the animal by reason of special circumstances affecting the nature of the locus in quo; that is to say, is not imposed because the animal when straying goes over or through a hedge or down a bank into the road and thereby creates the accident.

Turning to the question of special propensities, it must first be noted that, in my judgment, a special proclivity towards straying cannot be regarded (if known to the owner) as such a special characteristic as of itself imposes liability on him. Such a conclusion appears to me to be logically impossible. For if the occupier of the field is under no obligation whatever to prevent animals from straying upon the high road (unless they are dangerous or mischievous) the duty cannot be imposed upon him in respect of a particular animal which is more prone than its fellows to take advantage of the liberty afforded to them. I cannot treat the reference to "disposition to wander" in Lord du Parcq's speech (16) as indicating any contrary view. Indeed, I think the authorities are clear that in order to impose liability the characteristics must be those of viciousness or mischievousness. It is no doubt impossible to apply to an animal an epithet which imports any kind of ethical standard. But the word "vicious" as applied to animals is well understood and indicates a savage disposition, a propensity to attack people. I think it must also be treated as clear that an animal, though not savage,

(13) [1947] A. C. 341, 358.
(14) (1700) 1 Ld. Raym. 606, 608.
(15) [1947] A. C. 341, 361.
(16) Ibid. 358.

which is dangerous because of its frolicsome behaviour, must equally be taken to have propensities against which (if he knows of them) the owner has a duty to guard. All the authorities, in my judgment, support this view, and I refer particularly to the citation from Blackburn, J., in *Smith* v. *Cook* (17), cited by Lord du Parcq (18). The basis of the liability, in my judgment, is not that such a horse by its mere presence on the highway may cause an obstruction, but because such a horse, when on the highway and therefore when likely to meet passers-by on the highway, is known to be likely to indulge its dangerous propensities.

In the present case the county court judge has found, and I think found quite clearly, that the horse in question had no such propensities. I acknowledge that I feel a serious doubt whether I should myself have been persuaded to accept the partiality of the defendant's wife for this unbroken mare. But Parliament has laid it down that there shall be no appeal on fact from a county court, and I think it impossible to say that there is no evidence on which the judge could find as he did. The only propensity which the judge has found the animal to possess is a propensity for wandering, and as regards this I have already given my reason for thinking that such a propensity could not itself impose liability on the owner.

But it is said that the horse had another propensity, namely, a peculiar liking for leaping over hedges and, in particular, for leaping over hedges upon passers-by in the road. If this were true and known to its owner, I should think that he might well be under a duty to keep the animal tethered. But, in my judgment, there is no evidence to support it. Evidence that on some one or more other occasions it was found in the road, and that on one of such occasions there was difficulty in catching it, is not evidence that the animal, when in the road, was dangerous or mischievous within the meaning of the law as I understand it to be; still less that it had a partiality for leaping over hedges upon passers-by. Nor am I able to accept the view that because (and I will assume it) the mare was a peculiar one in some respects, one can therefore find here special circumstances, taking into account the nature of the road and the fences, which impose liability upon the defendant.

Reference has been made to Lord Atkin's observation in *Fardon* v. *Harcourt-Rivington* (19), quoted by Lord du Parcq (20). But Lord du Parcq makes it quite plain that Lord Atkin's general proposition must be read subject to qualifications, and those qualifications, as it seems to me, prevent the application of the observation to the present case. The animal being found to be of mild disposition, there is nothing whatever to show that its act on the night in question in leaping in the dark over the fence into the road was a peculiar characteristic of the horse, or alternatively, was not contrary to its ordinary nature; for it must be unusual in the extreme for a domestic animal to take such a leap out of a field in the night.

---

(17) (1875) 1 Q. B. D. 79, 82.
(18) [1947] A. C. 341, 359.
(19) (1932) 146 L. T. 391, 392.
(20) [1947] A. C. 341, 359.

It is no doubt tempting to say that this was an animal of unusual characteristics, that therefore the owner must have been under a duty to hobble or tether it (for no other means would have been effective), and, therefore again, that the accident was due to the breach of duty. But in the first place I think that such a statement of the case involves a flying in the face of the judge's findings of fact, and, in the second, I think that it involves far too imprecise a formulation of the appropriate principle of law and would inevitably introduce into the law serious uncertainties and capriciousness.

Put in its briefest form, my conclusion is: as a general proposition, the owner of animals is under no liability to prevent them straying, even though the straying may take the form of leaping over or through hedges and down banks into a highway at a lower level; if any given case is shown to be an exception to the general rule, it must be because the animal in question is known to have some peculiarity which renders it dangerous when on the highway, or because it must have a propensity, through vice or playfulness, of leaping from a field at or upon persons on the highway. In the present case, in my judgment, if there is any evidence to support the fact that this animal had such peculiarities, the finding of the county court judge is wholly to the contrary effect.

I have therefore come to the conclusion that the appeal must be allowed. I cannot help feeling sympathy for the plaintiff, not the less so because of my doubts in regard to the judge's finding of fact. But these doubts may well be ill-founded, and I console myself by reflecting that what might have been a most serious accident was, in fact, not serious. Had it been otherwise, I should have been tempted to consider remitting the case for a retrial. But, in the circumstances, I do not think such a procedure would be justified. I think that the county court judge's order ought to be discharged and the plaintiff's action dismissed.

SINGLETON, L.J. The mare which caused the damage was an animal of a most unusual type. She was a six and a half year old Shire mare; she had never been broken in; she belonged to a farmer who said that he had bought her for breeding and working when she was seven months old but had never had the time to break her in; nor had he bred from her. She had been shown on occasions, but not for the last two years. If a stranger tried to catch her she ran at him " mouth abroad ". She was blindfolded if she was out at grass when in season. The judge might have found that she was vicious, but he did not do so. He accepted the evidence of the defendant's wife that the mare " has a sweet " nature and is not in any way dangerous ". The judge found that the defendant, the owner of the horse, was liable in damages for negligence in that he knew " the animal's propensity to stray " because it had done so on previous occasions. . . . His failure " to prevent the animal getting on the highway amounts to " negligence ". This, taken by itself, cannot stand. So much is clear from the decision of the House of Lords in *Searle* v. *Wallbank* (21). Yet the evidence discloses another side of the character or habits of the defendant's mare: she was accustomed to jumping in a manner quite unbecoming to a Shire mare; one wonders why a farmer kept her so long on his farm unbroken.

[His Lordship referred to the facts, reviewed the evidence and continued]:—There was probably some sort of gap, or a low place in the hedge, but so far as we know the hedge was normally sufficient. This mare had been in another field—two or three fields below—and had got into the field from which she jumped on to the highway. There is no evidence to show how she accomplished the journey, though it must have been over the fences, as the farmer said that the hedges were all right. No doubt if she wished to get on to the road she would take the fence at the point which seemed best. She was not an ordinary animal—far from it. She was not kept on the farm for the purpose of work. She was an amazing jumper, and from time to time she went over the fence and on to the road. She was mischievous in this sense. No fence would stop her, it was said. The defendant knew this. It seems to me that, in those circumstances, he ought to have appreciated that there was risk of an accident unless he took some care.

One who keeps a mare of such an unusual type owes a duty to the public and to users of the highway in particular; and it was submitted to this court that the defendant had failed to take the care which a reasonable man would have taken in the circumstances. If the mare could not properly be tethered outside, she ought to have been put inside, at least at night time, it was said. A case on these lines might have been made in the county court, and I am inclined to think that there was evidence on which the judge could have found that there were special circumstances so as to bring the case within both limbs of what Lord du Parcq said in *Searle* v. *Wallbank* (22). The difficulties in the way of the plaintiff are that: (1.) the judge decided the issue on grounds which cannot be supported; (2.) there are no

---

(21) [1947] A. C. 341.

(22) Ibid. 360.

C. A.
1950

BROOK
v.
RICHARDS.

Singleton, L.J.

findings of fact as to the propensity of the mare to jump, or to jump on to the highway—and though there is evidence of it, I doubt whether it is sufficient to justify this court in basing conclusions upon it, especially in view of the fact that (3.) the propensity to jump (or to jump on to the road) was not pleaded, and does not appear to have been put forward as the case for the plaintiff.

In these circumstances, I feel, with some regret, that the appeal must be allowed and judgment be entered for the defendant.

I have considered whether there should be a re-trial. That would involve more expense for the parties in a case in which the damages are small. On the whole, I do not think that it would be right to give the plaintiff an opportunity of now setting up a different case, one which was neither pleaded nor argued before the county court judge.

VAISEY, J. I am not prepared to dissent from the conclusions reached by my Lords, or to express any disagreement with the views expressed in the judgments which have just been delivered. I therefore agree that this appeal must be allowed, but I do so with considerable regret, and that for two principal reasons: first, the plaintiff is a platelayer, and I cannot believe that his resources are large. The defendant is a farmer, whose means have allowed him the luxury of keeping this mare for no other purpose, apparently, than that of being a sort of favourite pet for the amusement of his wife. He has never broken her or bred from her or used her for work of any sort. The damages awarded to the plaintiff amounted to no more that the trifling sum of 28*l.* 11*s.* 8*d.* It would not, I think, have been conspicuously generous on the defendant's part if he had accepted the decision of the county court judge without bringing this rather petty case to this appellate court. That, however, he was of course entitled to do as a matter of right, and no doubt his success today proves that he was justified in doing so. Secondly, and this is perhaps the more cogent cause of my regret, the defendant will be all too likely to regard our judgment as completely absolving him from any duty to take any precautions to control this animal, and to prevent too frequent repetitions of its saltatory performances in the future. I should not be surprised if the inhabitants of the neighbourhood are inclined, notwithstanding our judgment, to regard this particular stretch of the Newquay—St. Austell Road as somewhat perilous to wayfarers, especially in the hours of darkness. An animal which strays on to a highway from adjoining level ground is a much less alarming phenomenon than one which jumps over or through a hedge from a place where it cannot see where it is going to land, and cannot be seen by the unfortunate traveller who intercepts its flight.

The accident was luckily trivial in its consequences; but it might have been serious and even fatal to the plaintiff, though I suppose that that would have made no difference to the decision either in the court below or here, except that we might in that case have ordered a new trial. I agree with my Lords that that is an order which, in the circumstances, we ought not to make. I also agree with them in their view that the express findings of the county court judge are so phrased as to preclude us from upholding his decision.

Appeal allowed.

Solicitors: *Fred Hollis for Thrall, Llewellyn & Spooner, Truro; Barlow, Lyde & Gilbert for Stephens & Scown, Wadebridge.*

B. A. B.

REX *v.* HAMPSTEAD AND ST. PANCRAS RENT TRIBUNAL; *Ex parte* GOODMAN.

1950
Dec. 14.

Lord Goddard, C.J., Hilbery and Parker, JJ.

Landlord and Tenant—Rent control—Unfurnished dwelling-house—Application to tribunal to determine reasonable rent—Agreement as to rent reached before decision of tribunal—Notification sent to tribunal—Right of applicant to withdraw application—Landlord and Tenant (Rent Control) Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 1.

Where an application is made by landlord or tenant under s. 1 of the Landlord and Tenant (Rent Control) Act, 1949, to a rent tribunal to fix the standard rent of a dwelling-house, the application may be withdrawn at any time before it is heard and, *semble,* up to any time before the decision of the tribunal is given; and, if it is so withdrawn, the tribunal are under no duty, and have no power, to proceed to hear or determine the application.

APPLICATION for an order of prohibition.

By a lease dated October 14, 1947, the applicant, Dr. T. Goodman, let to Dr. W. M. King certain premises at 21c Cannon Place, Hampstead, for fourteen years from September 29, 1947, at a rent of 383*l.* a year for the first three years and thereafter at 300*l.* a year. On September 5, 1949, the tenant applied to the Hampstead and St. Pancras Rent Tribunal, under s. 1 of the

Landlord and Tenant (Rent Control) Act, 1949 (1), to fix the rent of the premises. In February, 1950, before the application was heard by the tribunal, the solicitors for the landlord and tenant met and agreed that the rent should be reduced to 320*l.* for the year ending September 29, 1950, and thereafter to 300*l.* a year, inclusive of rates. The tribunal were duly notified of the decision which had been reached, but expressed the view that having regard to the wording of s. 1, sub-s. 1, of the Landlord and Tenant (Rent Control) Act, 1949, the application to the tribunal could not be withdrawn, and stated that they accordingly proposed to consider it and make an appropriate decision. The landlord thereupon applied for an order of prohibition to prohibit the tribunal from further considering the application.

Gallop, K.C., and *Dennis Lloyd* for the landlord. Prohibition should issue in this case since a tribunal have no power to consider an application under the Act against the wishes of the landlord and tenant, who are the only two persons who have the right to resort to the tribunal. The Act of 1949 differs from the Furnished Houses (Rent Control) Act, 1946, which gives a local authority the right to make an application to a tribunal, in that under the later Act a local authority have no status. Under its provisions it is only when there is a tenant in existence that anyone is given the right to approach a tribunal. Under s. 1, sub-s. 1, which confers on a landlord or tenant the right to make an application, there is nothing which restricts the right of an applicant to abandon his application or of a respondent to withdraw his opposition. Further, there is nothing in the sub-section which justifies the attitude taken up by the tribunal that the mere making of an application imposes on the tribunal an obligation which they are bound to perform. If the legislature had desired to impose any limitation on the right to withdraw an application it could easily have so provided.

Sir Hartley Shawcross, A.-G., and *Ashworth* for the rent tribunal. The tribunal were right in the view which they took.

---

(1) Landlord and Tenant (Rent Control) Act, 1949, s. 1, sub-s. 1: "Where apart from this section the "standard rent of a dwelling-house "would be—(*a*) the rent at which it "was let on a letting beginning after "the 1st day of September, 1939, or "(*b*) an amount ascertainable by "apportionment of the rent at which "a property of which it formed part "was let at such a letting as afore- "said (whether such an apportion- "ment has been made or not), then, "subject to the provisions of this sec- "tion, the landlord or the tenant may "make application to the tribunal to "determine what rent is reasonable "for that dwelling-house, and on any "such application the tribunal shall "determine that rent and shall notify "the parties of their determination: "Provided that an application shall "not be made in respect of a dwel- "ling-house if a previous application "in respect thereof has been made "under this subsection".

The merits of the present case are not important, but the Minister is concerned for the reason that the function of the rent tribunal is not simply to give a decision inter partes in a particular case, but to fix a standard rent which will operate in rem. The sole question is whether, when once an application has been made to the tribunal under s. 1, sub-s. 1, of the Act of 1949, the tribunal are bound, or entitled, to determine the reasonable rent of the premises concerned notwithstanding that the applicant has withdrawn, or has purported to withdraw, his application. The provision in sub-s. 1 that "on any such application the tribunal shall determine that rent and shall notify the parties of their determination" is mandatory and unqualified; and prima facie, therefore, when once an application has been made, the tribunal are not only entitled but bound to determine the reasonable rent. The proviso to s. 1, sub-s. 1, that an application shall not be made in respect of a dwelling-house if a previous application in respect of that dwelling-house has been made under the sub-section, shows that the excluding factor is not a previous determination, but a previous application, which indicates a clear intention that an application must inevitably lead to a determination.

No instance can be found in which a person who launches proceedings before a court or tribunal which is bound by statute to determine the questions submitted to it has an absolute, unqualified right to withdraw. In such a case the application can only be withdrawn by permission of the court or tribunal or on terms. It is submitted, therefore, that in the present case the tribunal were either bound to determine the question raised by the application or alternatively that they had a discretion to refuse permission for it to be withdrawn.

If the court is against that contention, it is desirable that a ruling should be given as to the time up to which the withdrawal of an application can take place.

I. H. Jacob and *H. O. Nunes* held watching briefs for the tenant.

Lord Goddard, C.J. It seems that, although the rent fixed by the lease was 383*l.* for the first three years and 300*l.* thereafter, exclusive of rates, the rateable value of the premises is under 100*l.*, and accordingly, as it is an unfurnished letting, the case is one in which the tribunal would have jurisdiction.

After the application by the tenant had been sent in on September 5, 1949, the parties came to an agreement between themselves as to the rent which was to be paid, and so informed the tribunal. The tribunal intimated to the parties that in their opinion, as an application had been made, they were, notwithstanding the agreement arrived at, bound to continue the hearing;

but they adjourned the hearing because they were informed that an application would be made to this court for an order of prohibition.

It is necessary to remember what I may call the genesis of the Landlord and Tenant (Rent Control) Act, 1949. When war broke out in September, 1939, an Act was passed which brought under control a great number of houses which had not previously been controlled. It was provided in that Act that the standard rent should be the rent at which the premises were let on September 1, 1939, or, if let thereafter, the rent at which they were first so let, and that provision, of course, gave an opportunity to landlords who had property which they could let to fix any rent they liked, unless the premises had already been let on September 1. If they were let, say, on October 1, 1939, or during 1940, the landlord could fix any rent he liked, and that rent became the standard rent.

Parliament then intervened in 1949 and conferred on the rent tribunals power to say what, in their opinion, the standard rent ought to be; in other words, it gave the tribunals power to alter the standard rent fixed by the Act of 1939 and say that in place of that there should be a new rent, which they were to fix.

[His Lordship read s. 1 of the Act of 1949, and continued:—] It is to be observed that the application may be made either by the landlord or the tenant; and if a rent has been fixed by the tribunal there is no question but that no further application can be made. But it seems to me that, until there has been an application on which a tribunal have adjudicated, it would always be open to any tenant of the premises to go to the tribunal and ask for the rent to be fixed. Unless someone goes to the tribunal and asks for the rent to be fixed, the standard rent remains what it was in September, 1939. No local authority or any other person can go to the tribunal and say: "Fix the rent of this "house". The only persons who can do it are the landlord or the tenant; and if the tenant is content with his bargain and does not seek to get out of it, the standard rent will remain at the figure at which it stood at the first letting after September 1, 1939. But if the tenant ceases to occupy the premises, or assigns the premises, any subsequent tenant may go to the tribunal to have the rent fixed.

That being the case, is there any reason why we should construe the section as meaning that when once an application, in the sense of the filling in of forms, has been made, the tribunal must go on to fix a rent which will adhere to the premises for ever? I think that the section must mean that there must be a subsisting application at the time when the tribunal are to determine the rent, and that we must read the words of s. 1 (*b*) as meaning: "On any such application made and not withdrawn "the tribunal shall determine that rent and shall notify the "parties of their determination: provided that an application "shall not be made in respect of a dwelling-house if a previous "application in respect thereof has been made under this sub-"section". I certainly do not read the section as meaning that if someone has sent in a form of application and then withdrawn it, a subsequent tenant would be debarred from going to the tribunal and asking for the rent to be fixed. It seems to me that, unless we find strong words to the contrary in the section, a tribunal can only have jurisdiction so long as an application subsists. I think, therefore, that the tenant may at any time withdraw his application.

It might be that a tenant, having solemnly agreed to pay a certain rent, and being probably very glad to get a flat or a house, might put in an application under this Act and might afterwards think: "I promised to pay that rent and it is only "right that I should pay it; I should therefore like to with-"draw my application". I do not see why he should not do so. Or he may go to his landlord, or his landlord may go to him, and they may come to an agreement which the tenant may think gives him everything he has reason to desire. If that is so, again I cannot see why the parties should not put an end to the application by not pursuing it. The tribunal have to determine the rent on an application, but their right to determine it seems to me to depend on the application's subsisting at the time when the tribunal consider it. In my opinion, if the parties choose by consent to withdraw an application, the tribunal are not under any duty to. and, indeed, cannot, proceed with the hearing; but any subsequent tenant may go to the tribunal, because there will not have been an application which resulted in the fixing of the rent. It is only when there is such an application that their determination becomes final.

The Attorney-General has asked us, if we should be of opinion that an application may be withdrawn, to give a decision on the question up to what time the withdrawal can be made. That point does not strictly arise in the present case, but for my part I think an application may be withdrawn up to any time before the tribunal give their decision. I have no doubt my brothers will express their opinion, but I think that the order for prohibition must go.

Hilbery, J. I agree with all that has fallen from my Lord, but, since he invites it, I will say this: it appears to me that the policy of the Act with which we are concerned is to give a right to two people personally to go to the tribunal on an application to have the decision of the tribunal upon what shall be the standard rent of premises. It is of importance to notice

1950

Rex
v.
Hampstead
and
St. Pancras
Rent
Tribunal.
Ex parte
Goodman.

Hilbery, J.

that in this Act, at any rate, there is no power given to a local authority of their own motion to apply to the tribunal to fix, in rem, a standard rent in respect of the premises in question. The right given is a personal right to the landlord and to the tenant to make an application on which the tribunal will determine what rent is reasonable for the dwelling-house, although, if the landlord and the tenant did not exercise the right thus given to them, the standard rent would be the rent at which the premises had been let on a letting beginning after September 1, 1939.

The jurisdiction of the tribunal is, therefore, a jurisdiction given to them to determine a matter which is brought to them for decision as the result of the exercise of personal rights by certain persons: I cannot conceive, as a matter of general principle, why, in those circumstances, the parties should not say to the tribunal, at any time before they give their decision, that they no longer wish to exercise the rights given to them and no longer ask the tribunal to give their decision upon what is the reasonable rent. It must be, on some occasions, an advantage to the parties to be able to do that. I can conceive of cases where, by a bargain made after an application has been put in by the tenant, he may obtain, as a matter of arrangement with the landlord, a rent which he thinks is even lower than the tribunal would award. It appears to me to be eminently salutary that the parties should be able not only to exercise the right they are given by the Act to invoke the jurisdiction of the tribunal, but also to avoid a decision by the tribunal where it seems to them no longer desirable to go on. My Lord has considered the situation which would arise in such circumstances, and has demonstrated, on the construction which he puts on the Act, and with which I concur, that in such circumstances, on that construction, no one will lose the right of subsequently making an effective application to the tribunal and of obtaining a decision upon it.

For these reasons, in addition to those given by my Lord, I agree.

Parker, J. I agree with both the judgments which have been delivered.

Application granted.

Solicitors: *E. Royalton Kisch & Co.; the Solicitor, Ministry of Health; E. Duchin.*

P. B. D.

C. A.

1950
Dec. 18.

Evershed, M.R., Lord Radcliffe, Singleton, L.J

TINKHAM *v.* PERRY.

[Plaint No. 399.]

Landlord and Tenant—Rent restriction—Death of tenant—Wife not living with him at death—Whether member of tenant's family residing with him entitled to protection—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*g*).

On the true construction of s. 12, sub-s. 1 (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the words "where a tenant leaves no widow" are not to be read as "where "a tenant leaves no widow residing with him as aforesaid".

Accordingly, where a statutory tenant was left by his wife in 1948, and thereafter cohabited with the defendant as his wife, two children being born of that association, and the defendant, the tenant having died survived by his wife, claimed to remain in the demised premises as a tenant under s. 12, sub-s. 1 (*g*):—

Held, that the paragraph could have no application to the case since the tenant had not died leaving no widow, and that the defendant's claim therefore failed.

Quære, whether the defendant could in any circumstances be held to be a member of the deceased tenant's family within the meaning of the section.

Appeal from Judge Pratt, sitting at Newton Abbot county court.

The plaintiff, Mrs. Ellen Edith Tinkham, was the owner of 11, Sea Lawn Terrace, Dawlish, which she had let to one Hugh Latter, who was at all material times the statutory tenant of the premises. The tenant had resided in the premises with his wife until September, 1948. She then left him, and the defendant went to live with him as his wife in the house. The tenant died on August 24, 1950, and on August 28, 1950, the landlord served notice to quit on the defendant, and in these proceedings claimed possession. There had been two children born as the result of the cohabitation of the tenant with the defendant, and she claimed to be entitled to the protection of the Rent Restriction Acts as being a "tenant" within the definition in s. 12, sub-s. 1 (*g*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1).

---

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1 (*g*): "The expression "'tenant' includes the widow of a "tenant who was residing with him "at the time of his death, or, where "a tenant leaves no widow or is a "woman, such member of the "tenant's family so residing as "aforesaid as may be decided in "default of agreement by the county "court . . .".

C. A.
1950

TINKHAM
v.
PERRY.

The county court judge made an order for possession, and the defendant appealed.

L. A. Blundell for the defendant. It is not contended that the defendant comes within the term "widow" in s. 12, sub-s. 1 (*g*), of the Act of 1920. It is, however, submitted that she comes within the definition of "tenant" in that paragraph. It is clear that, since the tenant's widow was not residing with him at his death, she is not within the definition of "tenant". It is submitted that para. (*g*) should be construed as meaning "where "a tenant leaves no widow residing with him at his death". Then a member of his family so residing with him will be entitled to claim protection as tenant. If words were not read into para. (*g*) limiting the words "leaves no widow" to the case where a tenant leaves no widow residing with him, the intention of Parliament would be defeated, for it would mean that, if a man left a widow who was not living with him, his children who were could not claim the protection of the Acts. It is submitted that the second reference to "widow" means a widow having a similar character to the widow first referred to—that is, to a widow residing with the tenant at his death. In view of the manifest intention of this sub-section, appropriate words should be read into it limiting the scope of the word "widow". That there is power to read words into an Act of Parliament limiting the general scope of the language appears from the decision in *In re Bidie* (2). Unless the court is satisfied that "widow" is to be construed in a limited sense, the contention that the defendant was a member of the tenant's family does not arise for argument.

A. K. Kisch, for the landlord, was not called on to argue.

EVERSHED, M.R. [after stating the facts.] The claim of the defendant is that in the circumstances of the case she falls within the ambit of para. (*g*) of s. 12, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, either as a widow of the tenant, or, alternatively, as a member of his family. In each case, she says, and with truth, that she was residing with the tenant at the date of his death. [His lordship read para. (*g*).] Mr. Blundell has felt unable to argue that the defendant falls within the first part of the definition in s. 12, sub-s. 1, para. (*g*): he cannot say that the defendant was the widow of the tenant in any ordinary acceptation of those words, and certainly not within their use in this paragraph. But he has put forward the alternative argument, namely, that the second part of the definition can be made to apply to this case. As a

---

(2) [1949] Ch. 121.

C. A.
1950

TINKHAM
v.
PERRY.

Evershed, M.R.

premise to that part of his case he says that the words "where "a tenant leaves no widow" mean "leaves no widow such as "mentioned before, viz., a widow residing with him at the time "of his death".

If that be right, Mr. Blundell was prepared to contend that the defendant in the circumstances of the case could fairly be described as a member of the tenant's family. In my judgment it is impossible as a matter of fair construction of the language to limit the phrase "where a tenant leaves no widow" by the added qualification "residing with him as aforesaid". Words plainly should not be added by implication into a statute unless it is necessary to do so to give the language sense and meaning in its context. In this case I cannot see any need to read these words otherwise than in their ordinary sense. They apply, therefore, only to the case where a tenant dies leaving no widow. Since the tenant did not so die (for his widow is still alive) it follows that the rest of the paragraph cannot apply.

The chief ground on which Mr. Blundell urged us to add the qualification I have indicated was this: he said that, unless some such qualification were added, we should introduce anomalies that Parliament cannot be thought to have intended. Thus in the simple, and I am afraid not infrequent, case of a man whose wife has parted from him but who lives in a rent-controlled house with children of his own, those children could not on his death claim the benefit of the Act, because there was then living, elsewhere and separated from the husband, his widow. That, says Mr. Blundell, is a harsh result which Parliament could not intend. Further, in the other case in the paragraph, the case where the tenant is a woman, there is no such requisite that she should leave no widower. Those two considerations together make it, according to the argument, a more probable result that the words "where a tenant leaves no widow" mean "where the "tenant leaves no widow residing as aforesaid".

I fully accept the force of those considerations, and, indeed, it looks as though Parliament may not have chosen its language with its customary care; but the fact is that sense can perfectly well be given to this paragraph by reading the words as they are written and according to their ordinary context.

In re Bidie (3), to which Mr. Blundell alluded, was wholly different. The question there was whether the words "repre-"sentation in regard to the testator's estate for general purposes "is first taken out" meant representation of any kind, whether upon an intestacy, or by probate of a will. If they meant the former, which might be said to be prima facie what the words say, then in the case of a man dying apparently intestate, but of whom a will was some time later discovered, the widow would be barred altogether from claiming the benefit of that Act. But the whole purpose of the Inheritance (Family Provision) Act, 1938, was to give relief in certain circumstances to a woman who was inadequately provided for by the testator's will; that is to say, the statute only operates in the case of persons dying testate. That being so, it was held by this court to be not only the natural but the necessary consequence that the word "representation" must have been intended to refer to representation in the sense of probate being granted of the will under which the widow was claiming or could claim. No such consideration applies to this case; and I therefore agree with the judge that we cannot introduce into this paragraph the words which Mr. Blundell asks should be inserted.

---

(3) [1949] Ch. 121.

In the circumstances, it is unnecessary to consider the rest of Mr. Blundell's argument, though I must not be taken to be suggesting that he would succeed in showing that a woman living with a tenant in these circumstances, and on the evidence proved in this case, could be held to be a member of the tenant's family. On that I say nothing, having heard no argument. I think that the appeal should be dismissed.

LORD RADCLIFFE. I agree with all that has been said by the Master of the Rolls. The circumstances of the case are sad, but, in my view, there is no chance of the appeal succeeding unless the court were entitled to construe these words in s. 12, sub-s. 1 (*g*), "leaves no widow", as if they meant "leaves no widow so residing as aforesaid". It seems to me impossible to find in the context of that section or the Act as a whole any material which would entitle a court to introduce that qualification. Indeed, the facts that in the preceding sentence the words "was residing with "him at the time of his death" appear, and that the words which follow are "such member of the tenant's family so residing as "aforesaid" make it very difficult to suppose that the legislature, if it had intended the same qualification to apply to the word "widow", would not have expressly introduced the words there also. For these reasons I agree that the appeal must fail.

SINGLETON, L.J. I agree.

Appeal dismissed.

Solicitors: *Baileys, Shaw & Gillett, for Tozers, Dawlish; Taylor, Jelf & Co., for J. & S. P. Pope, Exeter.*

B. A. B.

JAMES *v.* THOMAS H. KENT & CO. LD.

[1949 J. 1238]

C. A.

1950
Nov. 9, 10.

Somervell and Denning, L.JJ., and Romer, J.

Master and servant—Oral agreement of service for three years—No sufficient memorandum in writing—Wrongful dismissal—Agreement void —No concluded agreement for three years—Implied term that employment only terminable by reasonable notice—Statute of Frauds, 1677 (29 *Car.* 2, *c.* 3), *s.* 4.

In June, 1946, at a meeting of shareholders of the defendant company, the plaintiff was appointed a director "subject to a "three-year contract with the company"; and at a subsequent directors' meeting the company's solicitor was instructed to prepare a service agreement for a minimum period of three years. In fact no service agreement was ever prepared, and in December, 1948, the plaintiff was dismissed by the company. By the present action he claimed 175*l.*, the balance of five months' salary, which he contended was due to him under a service agreement, or, alternatively, damages for breach of agreement and for wrongful dismissal. On appeal by the plaintiff from the dismissal of his action by the trial judge:—

Held, (1.) That the entry in the company's minute book of the plaintiff's appointment was not a sufficient note or memorandum to satisfy the Statute of Frauds; (2.) that, the alleged agreement being an oral agreement, no action on it would lie, and therefore the plaintiff could not sue for wrongful dismissal; (3.) that, there being an existing contract, no other contract could be implied on which the action could be based; but (4.) that, as it appeared that there never was any express contract, a contract could be implied, one of its terms being that it could be terminated by reasonable notice, which, as found by the trial judge, would be three months; and (5.) that the plaintiff could recover on this implied contract though it had never been pleaded or relied on in the court below.

APPEAL from Parker, J.

The defendant company, Thomas H. Kent and Co., Ld., were incorporated on June 4, 1946, and took over a business which had previously been carried on by the mother of the plaintiff Frank James, the plaintiff working in the garage. One Kent had bought the freehold of the garage from the plaintiff's mother. Of the company's shares he held 9,000, and the plaintiff 1,000; and the remainder were divided between various shareholders.

On June 17, 1946, a meeting of the members of the company was held, and, according to the minutes, "the appointment of "Messrs. Kent & James as first directors of the company was "approved subject to a three-year contract with the company, "at salaries of 1,020*l.* and 420*l.* per annum respectively".

At a subsequent meeting of the directors on the same day a solicitor was appointed and was instructed to prepare service agreements for a minimum period of three years for Kent and the plaintiff. On June 25, 1946, the solicitor wrote: "I will "prepare draft service agreements as soon as possible and send "to you for the consideration of the board"; but in fact no service agreements were ever prepared.

In 1948 trouble arose between the plaintiff and the company, and on December 22, 1948, the plaintiff was dismissed. He claimed by the present action 175*l.*, being the balance of five months' salary said to be due to him under a service agreement with the company, or, alternatively, damages for breach of agreement and for wrongful dismissal.

On June 26, 1950, Parker, J., held that, although there was an oral service agreement for three years between the plaintiff and the company, there was no sufficient memorandum in writing of the alleged contract to satisfy the Statute of Frauds, and in the circumstances the plaintiff could not recover anything for wrongful dismissal. The plaintiff appealed.

Rees-Davies for the plaintiff.

Aarvold for the defendants.

The arguments sufficiently appear in the judgments.

Somervell, L.J. The case made in the court below was that the plaintiff had, as the judge found, an oral agreement with the defendants for employment in a garage business for three years. He was dismissed and the five months' salary which he claims is for the balance of salary for the three years which, he says, were covered by the agreement between him and the defendants. In their defence, the defendants said, with regard to that agreement which they first denied: "If any such agreement as alleged "was entered into between the plaintiff and the defendant, such "agreement was a contract not to be performed within the space "of one year from the making thereof and there is no memorandum in writing of the alleged contract sufficient to satisfy "the Statute of Frauds". Of course, it is well known, and it was not disputed, that the doctrine of part performance does not apply to a service agreement within the Statute of Frauds. The judge found that there was such an agreement, but he held that there was no sufficient memorandum of it, and that in those circumstances the plaintiff could not recover anything for wrongful dismissal.

Mr. Rees-Davies argued before the judge, and it was the first of his arguments before us, that in cases where the court finds an oral agreement, but no sufficient memorandum of it, nevertheless, if the person serving under that agreement is dismissed, he can claim damages for wrongful dismissal on the basis that he was entitled to a reasonable notice.

[His Lordship stated the facts, read the material evidence as to the agreement, and continued:] The first question that we have to consider is this: assuming that there was such an oral agreement, was there a sufficient memorandum of it in writing to satisfy the statute? Reliance was placed on the minutes of the company meetings, and one point taken was that it was not clear from those minutes on what date the agreement started. We were referred to authorities which decide that that is a vital matter, and that if in an alleged memorandum the date on which service is to start cannot be found, it is not a sufficient memorandum. I do not propose to consider that point. It may well be that this minute, in its context, pointed to the agreement as beginning on June 4, 1946; but, however that may be, I think that the fact that the minute gives no indication, special or general, of the nature of the duties which the plaintiff was to perform, clearly shows that it was not a sufficient memorandum. Of course, in many service agreements a man may have to do many things on orders which he receives from his employers, but, as it seems to me, in order to satisfy the statute, there must be some indication of the general nature of the duties which the servant has to perform, and of his position as an employee in the company's service. I think that the judge was right in saying that there was no sufficient memorandum.

On that basis, the judge held that the plaintiff could not recover damages for wrongful dismissal. This is the paragraph in the judge's judgment which Mr. Rees-Davies challenges: "That being so, it seems to me that the claim on the agreement "alleged . . . must fail on the ground that it is unenforceable "in law. It is said by Mr. Rees-Davies, for the plaintiff, in the "alternative, that, even if he fails to establish an enforceable "agreement in those terms, his client is nevertheless entitled to "damages for wrongful dismissal, broadly speaking, on this "basis, that he did in fact serve the company from day to day "and from month to month and from year to year, in a "managerial capacity, and that he cannot, as it were, be thrown "out for no reason assigned and without notice; and he says "in the alternative that his client is entitled to six months' or "thereabouts wages as reasonable notice. The difficulty I feel "about the claim, attractive as it is, is that there is really "only one contract alleged . . . and his claim is under that "contract. And if, as I have held, that contract, although a "contract in being, is unenforceable by the instrument of Statute "of Frauds, I cannot see how any alternative claim can lie. "Indeed, if an alternative claim in such circumstances did lie,

C. A.
1950

JAMES
v.
THOMAS H.
KENT &
CO. LD.

Somervell, L.J.

"it would in effect render the Statute of Frauds in this respect "a complete nullity".

Mr. Rees-Davies argued that that was wrong, and that if it is necessary to disregard the contract, a term must be implied under which a man is entitled to reasonable notice. It has often been laid down that if a man has actually done work under a contract of service which is within s. 4 of the Statute of Frauds, and has actually done work for which he has not been paid, he can recover as on a quantum meruit any reasonable remuneration. But that is not this point.

The question here is whether we can imply a term as to notice.

On that matter, Mr. Aarvold relied on the old and often-cited case of *Britain* v. *Rossiter* (1). It was there held that: "A "contract, which is not enforceable by reason of the provisions "of the Statute of Frauds, s. 4, nevertheless is an existing contract "and is not void altogether, and a fresh contract cannot be "implied from acts done in pursuance of it". That seems to me to be precisely what Mr. Rees-Davies is asking us to do. He is asking us to imply a new contract of service "in the acts "done in pursuance", as he says, of the contract to which his client deposed. Brett, L.J., said (2): "It seems to me "impossible that a new contract can be implied from the doing of "acts which were clearly done in performance of the first contract only, and to infer from them a fresh contract would be "to draw an inference contrary to the fact". Thesiger, L.J., said (3): "But I need not discuss this question further, for in "*Snelling* v. *Lord Huntingfield* (4), which has never been overruled but on the contrary has been often followed, it was held "that a contract not enforceable by reason of the Statute of "Frauds, s. 4, nevertheless existed, and no contract can be "implied where an express contract exists".

This area of law was considered in *Scott* v. *Pattison* (5), where it was held that the employee "was entitled to sue in "assumpsit upon an implied promise by the defendant to pay "for the services rendered, and for that purpose to rely upon "a local custom, if proved, to pay wages during absence from "work through illness". That is an example of the principle to which I have already referred.

On those three points, therefore, I come to the conclusion that, on the case as presented to him, the judge was right.

But, in the course of argument here—and this point was first suggested by my brother Denning—the question arose

(1) (1879) 11 Q. B. D. 123.
(2) Ibid. 127.
(3) Ibid. 132.
(4) (1834) 1 C. M. & R. 20.
(5) [1923] 2 K. B. 723.

whether there ever was a concluded contract; and that, I think. depends on the proper construction of the minutes of the company. There was, of course, on this view, a contract in the sense that this plaintiff was working for the defendants; but the question under the Statute of Frauds is whether there was a contract for three years. With regard to that, the minute says: "The appointment of Messrs. Kent and James as first directors "of the company was approved subject to a three-year contract "with the company at salaries of 1,020*l.* and 420*l.* respectively". Immediately afterwards, the directors ordered the solicitor through the secretary of the company, to prepare draft service agreements for a minimum period of three years, which the solicitor said he would do.

It seems to me reasonably plain that at that time there was no concluded agreement for three years. There were matters which might well come up for discussion with regard to the draft agreement; it was to be "subject to contract"; and the meeting of the directors makes it clear that that means subject to the preparation of a draft which the board would consider. I think that, on that construction of this document, there was no binding agreement for three years. In one sense it is rather a curious position, in that the plaintiff—who naturally sought in the first instance to rely on an agreement which he believed to have been made, and the terms of which had undoubtedly been orally discussed—can now only succeed if we are satisfied that there was no agreement.

The result of that is that the plaintiff falls to be considered as a man employed by the company under a contract which fixed his remuneration, which was duly paid until trouble arose, but which did not fix its duration. In those circumstances, the law requires a reasonable period of notice. Parker, J., decided on three months; Mr. Rees-Davies suggested that six months; and Mr. Aarvold suggested one month was more appropriate. I see no reason to disagree with the period decided upon by the judge. Therefore, in my judgment, the plaintiff is entitled to recover damages for loss of earnings for three months.

DENNING, L.J. Upon the points argued before the judge, I agree with him. Assuming that there was a concluded oral agreement to employ the servant for three years and that there was no memorandum of it sufficient to satisfy the statute, then the servant could not sue for wrongful dismissal. He could not set up the special agreement because of the statute: and he could not rely on an implied agreement, because you cannot have an implied contract covering the same ground as an existing special contract. The special contract would remain in existence although there was no sufficient memorandum of it. The effect

C. A.
1950

JAMES
v.
THOMAS H. KENT & CO. LD.

Denning, L.J.

of the statute is not to make an agreement void, but only unenforceable. There would therefore still be in existence a special contract dealing with the duration of the service, and while it remained in existence, you could not have an implied contract on the self-same point. That appears from *Britain* v. *Rossiter* (6).

If the servant had fully performed his part of the contract by serving his full time, or, what is the same thing, by serving his full time save when excused by sickness, he could sue for a reasonable remuneration which might be equal to his stipulated wages: see *Scott* v. *Pattison* (7). Even if the servant has not served his full time, but is dismissed beforehand without good cause, then he can recover payment for any work he has done as upon a quantum meruit. It used to be said in the old days that in that case his action was on an implied contract and that was also said in *Scott* v. *Pattison* (7); but that is not a correct way of approach because, in none of these cases can you have an implied contract covering the same ground as an existing special contract. The proper ground of the claim is not in contract at all, but in restitution. It is money which, in justice, ought to be paid for services rendered.

The present claim for wrongful dismissal cannot be put on any such footing, because restitution is confined to cases where the defendant has received money which he ought to restore, or benefits for which he ought to pay. A claim for damages for wrongful dismissal can only rest in contract, and, if that contract in unenforceable by reason of the Statute of Frauds, then the claim must fail. This is the ground on which the judge dismissed the claim, and upon it I entirely agree with him.

But there was another point which was not argued before the judge. When the facts of this case are examined, it becomes plain that there was no concluded agreement to employ the plaintiff for three years. It was subject to the condition: "subject to a contract being executed binding him for three "years"; and no contract was ever executed. The result is that the plaintiff was employed for no determinate time. It was a general employment, not caught by the statute, in which it is always implied that it is only determinable by reasonable notice. Three months' notice would be reasonable, and the plaintiff is entitled to damages on that basis.

This point was not put before the judge, but I think that we should give effect to it. I cannot see that any evidence could have been called which would have altered the position, or that the defendants are in any way prejudiced by its not having been taken before, save in regard to costs, and we can make provision for them. I agree that the appeal should be allowed.

(6) 11 Q. B. D. 123.

(7) [1923] 2 K. B. 723.

ROMER, J. I agree. The point is a short and simple one, and I can add nothing to it, save by concurring in what has fallen from my Lord and Denning, L.J.

Appeal allowed.

Solicitors: *Williams & Poole; Woodroffes.*

A. W. G.

REX *v.* LONDON SESSIONS. *Ex parte* BEAUMONT.

1950
Dec. 15, 20.

Lord Goddard, C.J.,
Hilbery and Parker, JJ.

Procedure—Appeal from metropolitan magistrate—Defendant convicted and fined for obstruction—Order to enter into recognizances to be of good behaviour—Whether order made "on conviction"—Right of appeal—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 36, *sub-ss.* 1 *and* 2*—Metropolitan Police Act,* 1839 (2 *&* 3 *Vict. c.* 47), *s.* 54, *sub-s.* 6*—Justice of the Peace Act,* 1360, (34 *Edw.* 3, *c.* 1).

A defendant pleaded guilty before a metropolitan magistrate to a charge of obstructing the highway in contravention of s. 54 of the Metropolitan Police Act, 1839. The magistrate fined him, and thereafter, being satisfied by reason of his record that there was strong ground to suspect him of future similar misbehaviour, ordered him to enter into his own recognizance and find sureties for his good behaviour. Quarter sessions refused to hear his appeal against that order.

Held, that, as the words "any order made on conviction" in s. 36, sub-s. 2, of the Criminal Justice Act, 1948, meant any order made as a consequence of a conviction such as orders disqualifying a person from holding a driving licence or a firearm, or forfeiting goods which have been seized, and as the order to enter into recognizances was not made on the conviction of the offence with which the defendant was charged, but by virtue of powers of preventive justice given to magistrates by the Justice of the Peace Act, 1360, no appeal lay from it to quarter sessions.

APPLICATION for an order of mandamus.

On August 1, 1950, the applicant, Thomas Beaumont, pleaded guilty at Tower Bridge Police Court to a charge of wilfully obstructing the free passage of the highway by means of a costermonger's barrow, contrary to s. 54, sub-s. 6, of the Metropolitan Police Act, 1839. He was fined 40*s.* in respect of the offence. The magistrate, being satisfied on hearing his record of convictions that there was strong ground to suspect him of future similar misbehaviour, ordered him to enter into his own recognizances in the sum of 25*l.* and to find two sureties each in the sum of 25*l.* to be of good behaviour for six months and in default to be imprisoned for two months.

1950

REX
v.
LONDON
SESSIONS.
Ex parte
BEAUMONT.

He sought to appeal against the order, but quarter sessions held that they had no jurisdiction to entertain his appeal. He therefore made this application for an order of mandamus to hear and determine it.

B. St. Q. Power for the applicant. Section 36, sub.-s. 2, of the Criminal Justice Act, 1948 (1), provides that " sentence " includes any order made on conviction by a court of summary jurisdiction. The order which was made against the applicant was part of his sentence as it was made on conviction by the magistrate; and an appeal therefore lies from it. It was decided in *Rex* v. *London Sessions; Ex parte Metropolitan Police Commissioner* (2) that no appeal lay to quarter sessions from an order binding over the defendant; but s. 36 of the Act of 1948 is wider than s. 37 of the Criminal Justice Administration Act, 1914, and s. 25 of the Criminal Justice Act, 1925, which it replaced. It extended the meaning of " sentence ".

Gattie for the respondents, the justices at quarter sessions. This was not an order made " on conviction ". The applicant was brought before the magistrate on a charge of obstruction by virtue of s. 54 of the Metropolitan Police Act, 1839, and was given the maximum penalty under that Act. The subsequent order could have been made then, or on the next day, or thereafter by a different magistrate. It is merely a form of preventive justice by which any magistrate is empowered, if he has reasonable cause to believe that the defendant may in the future commit a similar offence, to take steps to see that that offence is not committed. The fact that the order was made immediately after the fine was imposed does not make it " an order made on " conviction ": it was made after but not " on " conviction. Magistrates are empowered to make these orders by virtue of the Justice of the Peace Act, 1360: see *Rex* v. *London Sessions; Ex parte Metropolitan Police Commissioner* (2) and *Rex* v. *Sandbach; Ex parte Williams* (3). If the magistrate in the present case had acquitted the applicant and had then ordered him to enter into a recognizance there could have been no appeal against her order. The magistrate was functa officio so far as the charge under the Act of 1839 was concerned; but because she had the applicant before her and suspected him of future similar misbehaviour, she exercised the powers with which she was invested quite apart from the Act. The order did not depend on the conviction for obstruction, but could have been made at any time. Such an order can be made against anyone who disturbs the peace: *Lansbury* v. *Riley* (4).

---

(1) Criminal Justice Act, 1948, s. 36, sub-s. 1: " A person convicted " by a court of summary jurisdiction " shall have a right of appeal—(*a*) if " he pleaded guilty or admitted the " truth of the information, against " his sentence . . .".

Sub-section 2: " For the purpose of " the last foregoing subsection, the " expression ' sentence ' includes any " order made on conviction by a court " of summary jurisdiction, not being " —(*a*) a probation order or an order " for conditional discharge; (*b*) an " order for the payment of costs; (*c*) " an order under s. 2 of the Protection of Animals Act, 1911 (which " enables the court to order the " destruction of an animal); (*d*) an " order made in pursuance of any " enactment under which the court " has no discretion as to the making " of the order or the terms thereof ".

(2) [1948] 1 K. B. 670.

(3) [1935] 2 K. B. 192.

Power in reply. Courts have referred to orders to enter into recognizances as part of the sentence even though they have taken the view that they were additional to the main sentence: see *Dunn* v. *Reg.* (5); *Rex* v. *Trueman* (6). The words of s. 36, sub-s. 2, are wide—" order made on conviction "—and the words used by the magistrate were " in addition to the penalty " imposed . . ."

Cur. adv. vult.

December 20. The following judgments were read:—

LORD GODDARD, C.J. The applicant desired to appeal, apparently, only against so much of the order as required him to find sureties, but nothing turns on that point. He was convicted before the magistrate for that he did wilfully obstruct the free passage of the highway by means of a costermonger's barrow contrary to s. 54, sub-s. 6, of the Metropolitan Police Act, 1839. The conviction states that it was adjudged that the defendant for his said offence do forfeit and pay a fine of 40*s*., and continues: " And whereas by reason of the defendant's " previous record of convictions there is a strong ground to " suspect him of future misbehaviour . . . it is ordered in " addition to the penalty imposed that the defendant do find " sufficient surety for his good behaviour, that is to say, that " he do enter into his own recognizance in the sum of 25*l*. and " do find two sureties each in the sum of 25*l*. to be of good " behaviour during the period of six months now next ensuing, " and in default of compliance with the said order . . . to be " imprisoned for eight weeks ". Quarter sessions held that they had no jurisdiction to entertain the appeal, hence this motion.

This court has so recently considered whether an appeal lies against an order of a justice requiring a person brought before him to be of good behaviour, which, to use the words of Blackstone in the Commentaries (Vol. IV, ch. 18), include

(4) [1914] 3 K. B. 229.
(5) (1847) 12 Q. B. 1031.
(6) [1913] 3 K. B. 164.

1950

Rex v. London Sessions. *Ex parte* Beaumont.

Lord Goddard, C.J.

security for the peace and somewhat more, that we need not repeat what was said in *Rex* v. *London Sessions; Ex parte Metropolitan Police Commissioner* (7), where the matter was fully considered. But Mr. Power argued that the law had now been changed by s. 36, sub-s. 2, of the Criminal Justice Act, 1948, which was not in force when that case was heard. Subsection 1 gives a person convicted by a court of summary jurisdiction a right of appeal, if he pleaded guilty, against his sentence, and sub-s. 2 provides that the expression "sentence" includes any order made on conviction with certain exceptions, one of which is an order for costs and another an order for the destruction of an animal under the Protection of Animals Act, 1911.

In my opinion, this sub-section did not and was not intended to alter the law with regard to the order of a justice requiring sureties of the peace or for good behaviour, even when made at the time when convicting for a substantive offence. The words "any order made on conviction" mean, in my opinion, an order made as a consequence of a conviction; and *Rex* v. *London Sessions; Ex parte Metropolitan Police Commissioner* (7) laid down in the clearest terms that an order for sureties was not a conviction and that there did not have to be a conviction for any offence to enable a justice to make such an order. As has been pointed out not only by Blackstone but in many cases, the order is in the nature of preventive justice. It is not a penalty for the offence for which the defendant was brought before the magistrate: the penalty for the offence in the present case was the fine, but the magistrate before whom the defendant appeared, being satisfied that there was a likelihood of his repeating the offence, called on him to provide sureties against the repetition. She could have required sureties although he was not charged with any offence, or had him brought up on another occasion for this purpose. In my opinion the orders against which the section contemplates that an appeal may be brought are those which a statute allows to be imposed as a consequence of conviction, such as orders disqualifying a person from holding a driving licence or a firearm, or forfeiting goods which have been seized. This view is supported by the two exceptions that I have mentioned: an order for costs is made not only on but in consequence of a conviction, and so is an order for the destruction of an animal, which cannot be made unless there is a conviction.

The only difficulty that can present itself here is that the order for sureties is contained in the formal conviction which has been drawn up as there was a notice of appeal. It would have been more regular, in my opinion, if a separate order had been drawn up with regard to the finding of sureties; but this conviction is not before us on certiorari, and I say no more on this subject. We are asked to order sessions to hear an appeal against the order to find sureties, and in my opinion they were right in holding that they had no jurisdiction to do so. The application is dismissed.

---

(7) [1948] 1 K. B. 670.

HILBERY, J. I am of the same opinion. The contention here is that London Sessions should be ordered by this court to hear and determine the appeal because the order made by the magistrate was said to be made appealable by s. 36 of the Criminal Justice Act, 1948.

[His Lordship read s. 36, sub-ss. 1 and 2, and continued:] The question, therefore, is whether the order in this case is an order made " on conviction " within the meaning of that expression as used in that section of the Act of 1948. True, it is an order made on the occasion of a conviction, and if the expression " made on conviction " as used in s. 36, sub-s. 2, means only that, then this is such an order.

But it must be remembered that, apart from the definition of sentence created by this statute, no order made by the court in addition to the sentence which it has passed has hitherto been any part of the sentence. After verdict, or confession by the accused person on arraignment, the court gave judgment: that was the regular completion of the record. Any order made by the court at the time when judgment was given was not part of the sentence and judgment: it was an order of the court added to the record. For the purposes of appeal s. 36 makes all such orders, save those which it expressly excepts, part of the sentence.

The definitive characteristic of orders made " on conviction " was that they were orders made as a consequence of the conviction of the particular offence of which the accused stood convicted. For example, an order might be made for the restitution of the stolen goods, for the stealing of which the thief had then just been sentenced; or on a conviction for dangerous driving an order might be made that the convicted person's driving licence should be endorsed, or suspended for a specified period; or, again, on a conviction for an offence against the customs laws an order might be made for the forfeiture of the goods.

If this is correct, as I think it is, then it is to such orders that the words in s. 36, sub-s. 2, which I have read must be intended to refer.

The order in question was not an order which could be made in the exercise by the magistrate of the jurisdiction to hear and determine the charge which was before her under s. 54, sub-s. 6, of the Metropolitan Police Act, 1839. In respect of that charge she exhausted her jurisdiction by awarding the maximum fine of 40*s*. That conviction alone did not give her the power to make the order now in question. To make the order which she made as an addition to the imposition of the maximum penalty for the offence which had been charged and admitted, she had necessarily to invoke powers of what has been called "preventive justice" given to her by the Justice of the Peace Act, 1360. Except for those powers she had no power to make the order which she did make.

The conviction of the applicant on August 1 of the offence charged against him on that day did not give the magistrate the power to make the order in question: it only provided an occasion, of which the magistrate took advantage, to consider something different from the offence for which she had sentenced the applicant, namely, the question whether she should not exercise the powers given her by the Act of 1360. In acting as she did she initiated a proceeding against the applicant under the Act of 1360 and decided to make the order.

In my opinion such an order, so made, cannot properly be said to be an order made on the conviction in question. Support for this view is, I think, to be derived from a consideration of the orders which the Criminal Justice Act, 1948, says shall be exceptions from those which are to be deemed for the purpose of appeal to be part of the sentence. Each one of the exceptions is such an order as the court would normally have power to make as a result of the conviction because of power given to the court to make such an order on that conviction. Unless excepted, they would be made appealable by the section, because they are orders which are made "on conviction".

The order in this case could not have been made part of the penalty for the offence of obstructing the highway: for that offence the magistrate was sentencing the applicant to the maximum penalty of 40*s*. Nor could it have been added to the conviction for that offence in the exercise of the powers of the magistrate when dealing with that offence alone.

In my view, therefore, the order was not an order made "on conviction" within the definition of "sentence" in s. 36, sub-s. 2, of the Criminal Justice Act, 1948. Therefore no appeal lay to London Sessions and this motion should be dismissed.

PARKER, J. I agree.

Application dismissed.

Solicitors: *Philip Conway, Thomas & Co.; the Solicitor, Metropolitan Police.*

S. C.

ARIS-BAINBRIDGE *v.* TURNER MANUFACTURING CO. LD.

1950
Oct. 12,
13, 30;
Nov. 3, 17.

McNair, J.

[1948 A. 828]

Contract — Commission — " On turnover of the company's annual " business "—Meaning of turnover—Whether lump-sum payments under settlements of war-time contracts included.

A company agreed to pay their sales manager a percentage of the turnover of their annual business as commission. At the time of engaging the sales manager the company had running certain war-time contracts with government departments, notices to terminate which had already been served under their " break " clauses ". During his employment the company received various lump sums in discharge of those contracts, representing payment both for articles taken over and for hardship suffered by the company as a result of the termination of the contracts.

Held, that the sales manager was entitled to commission also on those sums.

J. Gliksten & Son Ld. v. *Green*, [1929] A. C. 381, applied.

ACTION.

By a service agreement dated August 30, 1945, Turner Manufacturing Co. Ld., the defendants, agreed to employ the plaintiff, George Joseph Aris-Bainbridge, as sales manager at a monthly salary for a period of two years unless terminated by mutual consent. Commission on the " turnover of the company's " annual business " at the rate of 0.1 per cent. up to 500,000*l*. and at 0.05 per cent. above that amount was to be paid to the plaintiff on completion of the annual accounts on September 30 of each year. The plaintiff entered the service of the defendants in September, 1945. At that time, owing to the recent termination of hostilities, the defendants had still running war-time contracts which had to be worked out at the option of the government department concerned either by production of the articles contracted for, or part of them, or by settlement under the " break clauses " customarily inserted in such contracts with government departments; and in cases where the defendants had suffered hardship as a result of the termination of those contracts the Minister could authorize the payment of compensation to them. Notices under those " break clauses " had already been given, and in respect of the cancelled contracts the defendants received from 1945 to 1947 various lump-sum payments from the Government in respect of articles taken over and of compensation for hardship. The defendants referred to these amounts in their accounts as " redundancy claims ". They paid the plaintiff commission for the two years of his agreement on the basis of their net invoiced sales, that was, on their receipts other than those under the redundancy claims.

The plaintiff's appointment having been terminated on March 26, 1948, he claimed by this action damages for wrongful dismissal, which claim does not call for report. He further claimed the balance of commission alleged to be due to him, contending that commission ought to have been paid on the whole of the defendants' receipts instead of on selected receipts only.

C. P. Harvey, K.C., and *T. Elder Jones* for the plaintiff.

R. O'Sullivan, K.C., and *J. C. B. W. Leonard* for the defendants.

Cur. adv. vult.

November 17. McNair, J., delivering a reserved judgment, disposed of the claim for damages for wrongful dismissal, and continued:—The question whether the commission ought to have been paid on the whole of the company's receipts or only on selected receipts turns primarily on the meaning of the phrase "turnover of the company's annual business". Giving to this phrase its ordinary grammatical meaning, I consider that it includes all sums received and receivable in the year in question as the result of the company's trading, whether normal or abnormal; in other words, it means all the money which the company turns over in the year for the purpose of making its gains or losses. I am reinforced in that view by the speech of Lord Dunedin in the well-known case of *Gliksten & Son Ld.* v. *Green* (1), which raised the question whether a company who were carrying on business as timber merchants were required to bring into their profit and loss account as a trading receipt, for the purpose of arriving at the company's profits for income-tax purposes, a large sum which they had recovered under a fire insurance policy upon their stocks. The House held that they were so obliged, and Lord Dunedin said (2): "The whole point "is that the business of the company is to buy timber and "to sell timber, and when they sell timber they turn it into "money. This particular timber was turned into money, not "because it was sold, but because it was burned and they had "an insurance policy over it. The whole question comes to be "whether that is a turnover in the ordinary course of their "business. I think it was. They had that amount of timber, "which they got rid of and for which they got a certain price, "and then they could begin again. The more times you have "a turnover—that is to say, the more sales you can get, provided

(1) [1929] A. C. 381.

(2) Ibid. 385.

"that you are carrying on business at remunerative prices—the "better for you. The result of this fire was that they got rid "of so much timber and got the insurance money at that figure, "and that seems to me precisely in the same position as if they "got rid of it by giving it to a customer". That seems to me to support the construction at which I have arrived on this particular contract.

I see no reason at all why there should not be included in the annual turnover of the company's business any receipts arising under the terms of the break clause; they are moneys due under the contract. The plaintiff is therefore entitled to judgment for 244*l*. 11*s*. in respect of unpaid commission, and to the sum of 1,088*l*. 8*s*. 11*d*. as damages for wrongful dismissal.

Judgment for the plaintiff.

Solicitors: *Harold Kenwright & Cox; Preston, Lane-Claypon & O'Kelly, for Ansell & Sherwin, Birmingham.*

S. C.

WILLIAMS *v.* LINNITT.

C. A.

[1950 W. 541.]

1950
Nov. 21, 22, 23, 24;
Dec. 20.

Lord Tucker, Asquith and Denning, L.JJ.

Innkeeper—Common inn—Liability of innkeeper for loss of motor car stolen from car park—Owner of car a local resident calling at inn for liquid refreshment only—Traveller—Guest—Whether car park within hospitium of inn.

The plaintiff, a farmer, who lived about a mile from the defendant's inn, had been accustomed to visit the inn on several evenings each week to meet his friends and drink with them. Having spent the day on business in a town some three miles from the inn, he drove in his motor car to the inn, passing his own house on the way. On arriving he placed the car in the car park in front of the inn, but when he left the inn at closing time the car was found to have been stolen. He claimed to recover from the defendant, as the keeper of a common inn, the agreed value of the motor car.

In the car park were exhibited a large sign bearing the name of the inn and a smaller notice, as follows: "Car park. Patrons "only. Vehicles are admitted to this parking place on condition "that the proprietor shall not be liable for loss of or damage to "(a) any vehicle; (b) anything in, or on or about any vehicle, how"ever such loss or damage may be caused".

The trial judge found that the plaintiff was a traveller and entitled to be considered a guest at the inn, and that the innkeeper was liable at common law for the loss of the motor car.

On appeal it was contended for the innkeeper that the plaintiff, being a local resident, was not a traveller and therefore not to be considered as a guest under the custom of the realm, and further, that the car park was not within the hospitium of the inn and that the innkeeper was entitled by notice to protect himself against his strict liability.

Held (per totam curiam) that any person who came to an inn for the purpose of receiving such accommodation as the innkeeper could give him and he was ready to pay for, and who was so received by the innkeeper, was a traveller and entitled to the protection given by the common law to a guest, even though he was a local resident and came for no more than temporary refreshment and did not intend to stay the night in the inn.

Held, further (per Lord Tucker and Asquith, L.J., Denning, L.J., dissenting) that as the innkeeper had held himself out as willing to receive the motor cars of his customers on his premises, the car park must be included in the hospitium of the inn and the innkeeper could not by notice or special agreement avoid his strict liability for the safety of the goods of his guest.

Orchard v. *Bush & Co.* [1898] 2 Q. B. 284, applied.

Per Denning, L.J., the car park was prima facie infra hospitium, but as it was an open yard and probably not a safe place in which to leave a car, the innkeeper was entitled to protect himself against his strict liability and had effectively done so by the notice which he had exhibited.

Brand v. *Glass* (1564) Moo. K. B. 158, and *Sanders* v. *Spencer* (1567) 3 Dyer 266 (b), applied.

APPEAL from Lynskey, J., sitting at Warwick Assizes.

The plaintiff, John Frederick Williams, a farmer, living at The Beeches, Caldecote, some two or three miles from Nuneaton, Warwickshire, claimed from the defendant, R. W. Linnitt, the keeper of the Royal Red Gate Inn, Watling Street, near Nuneaton, damages for the loss of a motor car, of an agreed value of 470*l*. On February 15, 1949, the plaintiff, having been in his motor car to Nuneaton on business, drove, on his way back in the evening, past his own house without stopping and continued for a further distance of about a mile to the Royal Red Gate Inn, his admitted purpose being to meet some friends and drink with them. He had been accustomed to make similar visits to the inn on several nights each week. He had no intention of staying at the inn for the night. On arriving at the inn he placed his car near other cars in the parking place in front of the inn.

The following notice had been placed in the car park in addition to a signboard bearing the name of the inn: "Car park. "Patrons only. Vehicles are admitted to this parking place on "condition that the proprietor shall not be liable for loss of or "damage to (a) any vehicle; (b) anything in, or on or about any "vehicle, however such loss or damage may be caused". At closing time, when the plaintiff left the inn for the purpose of returning home, he found that his motor car had been stolen. In the above circumstances he sued the defendant, as the keeper of a common inn, for the value of the car.

The action was tried at Warwick Assizes, and on July 7, 1950, Lynskey, J., held that the plaintiff was a guest at the inn and that the defendant, as keeper of a common inn, was liable for the loss of the car. The defendant appealed.

Elwes, K.C., and *J. G. S. Hobson* for the innkeeper. There are three consequences which arise in law from the relationship of innkeeper and guest: (1.) The guest is entitled to be received by the keeper of a common inn and given such lodging and assistance as the resources of the inn afford. If that is denied him he can either proceed by action at law or indict the innkeeper at common law. (2.) The guest is entitled to have his effects kept safe. The innkeeper is by the custom of the realm an insurer of his guest's effects. (3.) The innkeeper has a lien on the guest's effects for his proper charges. Those consequences derive from the relationship of innkeeper and guest, and it is submitted that that relationship depends on three elements: (1.) The character of the innkeeper: he must be the keeper of a common inn. (2.) The character of the guest, who, it is submitted, must be in some sense a traveller or a wayfarer. (3.) Their respective purposes must be relevant. If the guest is a traveller and the keeper is the keeper of a common inn, each is concerned to use the inn as a common inn. If the guest is not a traveller and the inn is not a common inn the purposes are not relevant. If the guest is not a traveller the relationship does not arise, and it is submitted that the plaintiff here was not a traveller and that the relationship did not arise. The authorities establish that a guest must have in some reasonable sense the characteristics of a traveller, and, whatever may be the proper definition of a traveller the word does not include a person residing in the immediate neighbourhood who leaves his home for the purpose of drinking a glass of beer with friends at an inn and then returning home. All the relevant authorities, from *Calye's* case (1) down to the present time, establish that, for the purposes of an indictment against an innkeeper for refusing to receive a guest without reasonable excuse, it is necessary to aver that the person refused was a traveller; and that a similar

(1) (1584) 8 Co. Rep. 32a.

averment is necessary in a civil action for damages for such a refusal or for the loss of a guest's goods.

It is submitted that the interrelated rights and liabilities springing from very ancient usage are still important in contemporary life. It is still important for a traveller to have the right to be housed and fed when he is away from home, and it is still important for the innkeeper to have his lien on the luggage of a man who is a stranger and to whom in practice he is compelled to give credit. It is inherent in those two positions that a traveller is in a special position, and if this judgment stands it will no longer be possible to say, in law, that the innkeeper's right of lien is co-extensive or commensurate with the guest's right to have his effects kept safe.

The effect of the learned judge's judgment is to give to the obiter dicta in *Orchard* v. *Bush & Co.* (2) the fullest force and indeed to extend their application. The custom obliges the innkeeper to take in the stranger, and it is for that reason that the right of lien is given to him: there is no reason in equity why he should have a lien on the property of a local customer, who is known to him. The question in each case which the court has to decide is whether the relationship of common innkeeper and guest is established, and it is not established if there is no evidence on which the court can find that the guest had in some sense the character of a traveller. It may be thought that the historic basis of innkeeper law renders the custom out of date, but it is submitted that the traveller of today is just as much in need of bed and board as he was when he went about by coach or on horseback. It is a mistake to regard this custom as a quaint survival. It survives in accordance with modern needs.

It is also submitted that the motor car was not in the hospitium of the inn when parked in the car park. The innkeeper is not normally liable for the guest's goods placed upon the land of the innkeeper as distinguished from being placed within the inn's stables or garage. He may make special terms as to goods left on his land, by which the hospitium may be extended beyond the inn's stables and garage; but that extension is within the innkeeper's control and he may therefore exclude any part of the land by such a notice as was exhibited in the present case. It is immaterial that the notice was not read by the person going on to the land. The innkeeper, of course, loses his lien. The appeal should be allowed.

Gardiner, K.C., and *John Stevenson* for the plaintiff. There has not in 400 years been a case in which it has been held that an innkeeper can contract out of his common-law liability. It seems to have been assumed that he cannot. It is submitted that a traveller is entitled to bring his car with him, that the innkeeper is bound to receive it, and that it can be left in whatever place the innkeeper has for such vehicles. There is no evidence that it was ever suggested that the plaintiff should put the car in the garage. *Calye's* case (3) does not help in deciding what is infra hospitium; but it is submitted that if a notice is put up describing a place as a car park it is infra hospitium. If the plaintiff was a traveller and using the inn as a common inn and not an ale-house, what is infra hospitium is a question of fact. There is no suggestion that the car park did not belong to the innkeeper, and the fact that a notice was put up emphasized that it was the place where guests should park their cars. Whether or not it is true to say today that there is an obligation in law on innkeepers to provide accommodation for motor cars, this is a case in which the innkeeper did so provide.

---

(2) [1898] 2 Q. B. 284.

The real question in the present case is whether it is necessary, in order that the common-law liability of the innkeeper should arise, that the plaintiff should be a traveller. It is submitted that it is no longer the law that the innkeeper's common-law liability only arises in relation to travellers. The liability attaches to anyone who enters what is called a common inn intending to use some or all of the facilities which it provides, and who is so received.

Alternatively, it is submitted that if the common-law liability only arises in relation to one who is a traveller, anyone who enters what is in law a common inn, intending to use some or all of the facilities it provides, who is so received and who is not a private guest of the innkeeper, or a lodger, is a traveller. All the authorities are reconcilable on the footing that it has always been assumed that it is impossible to get to an inn unless one travels to it, either by walking, by riding, or by driving. Although the absence of authorities may be a double-edged weapon, it is a striking fact that it was not until *Reg.* v. *Rymer* (4) that there appeared the disqualification of a person residing in the neighbourhood of the inn. If the present appeal is allowed, *Bennett* v. *Mellor* (5) and *Orchard* v. *Bush & Co.* (6) will have to be overruled.

Elwes, K.C., in reply. It is not contended that the notice in the forecourt had any contractual effect. The whole problem is approached on the principle that the innkeeper is not entitled to contract out of his common-law duty. Prima facie the hospitium is the structure of the inn: the stables and the garage. It is clear that the hospitium can be extended, and the question

(3) 8 Co. Rep. 32a.
(4) (1877) 2 Q. B. D. 136.
(5) (1793) 5 Term Rep. 273.
(6) [1898] 2 Q. B. 284.

is whether in the present case it has been extended. It can only be extended by the innkeeper as a voluntary act, and he therefore retains control of the position. The onus is on the plaintiff to prove that the forecourt has been brought within the hospitium. The innkeeper has made it convenient for everybody, whether a traveller or not, to park cars on the forecourt, but he is entitled by notice to limit that dedication of the forecourt. There is nothing in the authorities to oblige an innkeeper to take in cars except the obiter dictum of Lord Coleridge, C.J., in *Robins* v. *Gray* (7). It is not contended that either *Bennett* v. *Mellor* (8) or *Orchard* v. *Bush* (9) was wrongly decided; but what is contended is that the obiter dictum in both those cases is wrong and unnecessary. "Traveller" must be given its ordinary English meaning, and not the esoteric meaning which the plaintiff seeks to give it.

Cur. adv. vult.

December 20. The following judgments were read:—

LORD TUCKER. This is an appeal from a judgment of Lynskey, J., at the Warwick Summer Assize of 1950, whereby he awarded the plaintiff 470*l*. damages for the loss of his motor car, which was stolen outside the Royal Red Gate Inn in Watling Street, near Nuneaton, where it had been parked by the plaintiff while he took liquid refreshment at the inn, of which the defendant was proprietor. It was admitted that the inn was a common inn and that the defendant was an innkeeper. [His lordship recited the facts as found by Lynskey, J., and continued:] A number of points were raised by way of defence, but the one of most interest and general importance was the contention that on these facts there was lacking one of the essential elements of an innkeeper's liability at common law, namely, that the plaintiff was not a "traveller". It was said by Mr. Elwes in his interesting and helpful argument on behalf of the defendant that, whatever might be the proper definition of a traveller in this connexion, it was sufficient for his purpose to contend that the word did not include a person residing in the immediate neighbourhood, who leaves his home for the sole purpose of spending an hour or so drinking with his friends at an inn and then returning home.

He cited all the relevant authorities from *Calye's* case (10) onwards down to the year 1948. I do not propose to refer to them all. It suffices to say that they clearly establish that for the purposes of an indictment against an innkeeper for refusing without reasonable excuse to receive, lodge or entertain, it is a necessary averment that the person refused was a traveller (see *The King* v. *Luellin* (11)), and that a similar averment is necessary in the case of a civil action claiming damages for such a refusal or for the loss of goods (see *Grimston* v. *An Innkeeper* (12), and the form of declaration in Bullen & Leake (3rd ed.), p. 344).

---

(7) [1895] 2 Q. B. 501, 504.
(8) 5 Term Rep. 273.
(9) [1898] 2 Q. B. 284.
(10) 8 Co. Rep. 32a; 1 Sm. L. C. (13th ed.) 120.

The second resolution in *Calye's* case (10) is as follows: "The "words are 'ad hospitandos homines, per partes ubi hujumsodi "hospitia existunt transeuntes, et in eisdem hospitantes'; by "which it appears that common inns are instituted for passengers "and wayfaring men; for the Latin word for an inn is 'diver-"'sorium', because he who lodges there is 'quasi divertens se "'a via'; and so 'diversoriolum'. And therefore if a neighbour, "who is no traveller, as a friend, at the request of the innkeeper "lodges there, and his goods be stolen, etc., he shall not have "an action; for the writ is 'ad hospitandos homines, etc., tran-"'seuntes, in eisdem hospitantes, etc.'".

It was in early times considered that to be a traveller a man must lodge at the inn. In *Warbrook* v. *Griffin* (13) it was said by Coke, C.J., "and if a neighbour of the innkeeper "come to the innkeeper, he shall not answer for the goods, for "he is not lodged, but as a tipler, and so if an innkeeper invite "any to his house ad prandendum aut cænandum the innkeeper "shall not be charged". In *Gulielm's* case (14) it was considered by Doderidge, J., that the traveller lost his status as such after one day's stay. On the second day he became a "hogen hinde" and on the third day a menial servant. In *Harland's* case (15) *Calye's* case was dissented from. It was urged that after a stay of fourteen days at an inn a man could no longer be a traveller; but it was held otherwise. By 1793, when *Bennett* v. *Mellor* (16) was decided, it had become recognized that it was not necessary for the guest to stay the night in order to charge the innkeeper, but that a passing visit for refreshment sufficed. Similarly in the course of time it became settled that it is a question of fact in each case whether the guest, by prolonging his stay, has ceased to be a traveller and become a lodger: see *Lamond* v. *Richard and Another* (17).

It is, however, remarkable that in only two cases has there ever been any discussion whether the plaintiff, on his arrival, could properly be considered a traveller. I shall refer to these

(11) (1701) 12 Mod. Rep. 445.
(12) (1627) Hetley 49.
(13) (1609) 2 Br. & G. 254
(14) (1625) Latch 88.
(15) (1641) Clay. 97.
(16) 5 Term Rep. 273.
(17) [1897] 1 Q. B. 541.

cases later. It is argued by Mr. Elwes that in every one of the other reported cases, although the question was not discussed, the facts were such that there was some evidence on which the plaintiff could have been held to be a traveller in the sense for which he contends. On the other hand, Mr. Gardiner says that all the cases, with one exception, are consistent with the view for which he contends, namely, that the word "traveller" includes all comers who come to an inn from outside, intending to make use of some or all of the facilities that it supplies and who are so received. This excludes friends invited as the private guests of the innkeeper, guests who have become lodgers, the servants or family of the innkeeper, and persons visiting the inn for other purposes, for example, a commercial traveller, who comes solely for the purpose of selling his wares.

These contentions necessitate a detailed examination of three cases. The first is *Bennett* v. *Mellor* (18). In that case action was brought against an innkeeper for the value of goods stolen at his inn. The case was tried by Buller, J., at the Lancaster Assizes and the facts were that the plaintiff's servant had taken the goods in question to market at Manchester and, not being able to dispose of them, went to the defendant's inn and asked if he could leave the goods there till next week (meaning the next market day). He was told by the defendant's wife that she could not tell, as they were full of parcels. The servant then sat down in the inn and had some liquor and put the goods behind him. When he got up after a short time the goods were missing. A verdict was found for the plaintiff. Buller, J., reporting the case on a motion for a new trial, said that, if the defendant's wife had accepted the goods upon the special request made, he should have considered her a bailee and not answerable, having been guilty of no negligence, but, that not being the case, he considered this to be the common case of goods brought into an inn by a guest and stolen from thence, in which case the innkeeper was liable. It was argued, first, that the innkeeper had refused to take charge of the goods and was not liable in this form of action, though the plaintiff might have his remedy in another form of action; and, secondly, that the plaintiff's servant did not come as a guest, but for the special purpose of asking the landlord to take charge of the goods. The rule was discharged. Grose, J., considered the case covered by *Calye's* case (19), saying, "According to that, if a man go into an inn and is accepted as a guest, the innkeeper is bound to take care of the goods of the guest; and so says the case in Dyer". It is said that on the facts the servant had apparently come from outside Manchester and was intending to return home and could accordingly be considered a traveller. On the other hand, it would certainly appear that no consideration was given to this aspect of the case by anyone, and that Grose, J., dealt with it on the basis of a relationship arising out of the acceptance of the servant by the innkeeper as a guest.

---

(18) 5 Term Rep. 273.

(19) 8 Co. Rep. 32a.

In *Thompson* v. *Lacy* (20) the headnote reads: "A house of "public entertainment in London, where beds, provisions, etc., "are furnished for all persons paying for the same, but which was "merely a tavern and coffee house, and was not frequented by "stage coaches and waggons from the country, and which had "no stables belonging to it, is to be considered an inn, and the "owner is subject to the liabilities of innkeepers, and has a lien "on the goods of his guest for the payment of his bill, and that "even where the guest did not appear to have been a traveller, "but one who had previously resided in furnished lodgings in "London".

The facts set out in the report were that the plaintiff, who had previously lived in furnished lodgings in London, went to the defendant's house and engaged a room. He continued to reside there for several months and then left. The defendant charged in his bill for eighty-three nights' lodging and claimed a lien on the plaintiff's goods. Abbott, C.J., directed a non-suit on an action of trover by the plaintiff. A rule nisi was obtained. Counsel showing cause confined their arguments to supporting the finding that the house was a common inn. Counsel appearing in support of the rule, however, contended that it was not an inn and that, even if it were, the plaintiff, having been an inhabitant of London, frequenting it and even sleeping there, was not a wayfaring man within the rule. The judgments of Abbott, C.J., Bayley, J., and Best, J., holding that the house was an inn, occupy a full page in the report of the case in the English Reports, but none of them even mentions the point taken that the plaintiff was not a traveller.

Finally, in *Orchard* v. *Bush* (21) the facts were that the plaintiff was in business in Liverpool and lived outside. He went one night to an hotel in Liverpool for supper at about 9 p.m., on his way to the station on his return home. His overcoat was stolen while he was at dinner. The county court judge found that the plaintiff was "a guest" of the innkeeper and gave judgment in his favour. On appeal to the Divisional Court Mr. Lush argued that merely taking temporary refreshment was not enough to constitute the plaintiff a traveller, and cited *Reg.* v. *Rymer* (22). Mr. Horridge, for the plaintiff, submitted that the relationship of innkeeper and guest is constituted if a person goes to an inn

(20) (1820) 3 B. & Ald. 283.
(21) [1898] 2 Q. B. 284.
(22) 2 Q. B. D. 136.

for the purpose of receiving such accommodation and services as are ordinarily given to guests. He is protected if he deposits his goods in a place in which such goods are usually taken in the inn. Wills and Kennedy, JJ., dismissed the appeal.

Wills, J., after stating that on the facts the plaintiff was a wayfarer, added: "I think a guest is a person who uses the inn, "either for a temporary or a more permanent stay, in order to "take what the inn can give". Kennedy, J., said, "It was "said that the plaintiff in the present case was not a traveller. "The authorities give no definition of what is a traveller; but, "looking at the reason of the thing, I should have thought that "any person, who was neither an inhabitant of the house nor a "private guest of the innkeeper or his family, but who came into "the house as a guest to get such accommodation as it afforded "and he was willing to pay for, was a traveller. It does not seem "to me to make any difference whether his journey be a long "or a short one. I agree that, on the facts of this case, the "plaintiff was a traveller; but, apart from the question whether "he was a traveller or not, I am of opinion that if a man is in "an inn for the purpose of receiving such accommodation as the "innkeeper can give him, he is entitled to the protection the "law gives to a guest at an inn. I agree with what is said in "the notes to *Calye's* case (23). 'It is not necessary in order "'that a man may be a guest, so as to fix the innkeeper with "'this sort of liability, that he should have come for more than "'a temporary refreshment'". As previously stated, *Reg.* v. "*Rymer* (24) was cited, as also was *Lamond* v. *Richard* (25).

It is true that Kennedy, J.'s statement of the law was obiter on the view taken on the facts, but none the less it merits the respect and consideration that are always accorded to the observations of that judge, and in my view it in no way conflicts with previous authority (save possibly *Rymer's* case (24)) and is entirely consistent with the interpretation of *Bennett* v. *Mellor* (26) and *Thompson* v. *Lacy* (27) for which the plaintiff in the present case contends.

This brings me to *Reg.* v. *Rymer* (24). In that case the defendant was indicted for refusing to serve liquor to the prosecutor, a local resident, who was in the habit of bringing his dogs onto licensed premises, to the annoyance of other customers. It was held by the Court of Crown Cases Reserved, first, that the bar in question, which was separated from the inn and had a different name, was not part of the inn; secondly, that the prosecutor was not a traveller; and, thirdly, that the defendant had not acted unreasonably. No counsel appeared to argue on either side, but, although the first ground would have been sufficient to dispose of the case, the court clearly decided that the prosecutor, being a local resident who called in for a drink, was not a traveller.

---

(23) 1 Sm. L. C. (10th ed.) 124.
(24) 2 Q. B. D. 136.
(25) [1897] 1 Q. B. 541.
(26) 5 Term Rep. 273.
(27) 3 B. & Ald. 283.

There is nothing to show what view Wills, J., and Kennedy, J., took of this case when it was cited to them in *Orchard* v. *Bush* (28). Although it is difficult to see that any distinction can be drawn between what constitutes a traveller for the purposes of such a prosecution and what is necessary in a civil action at the suit of one who has in fact been accepted as a guest at an inn and lost his goods therein, none the less I cannot regard the decision in this criminal prosecution as compelling me to the view that the law was incorrectly stated by Kennedy, J., in *Orchard* v. *Bush* (28), and the same observation applies to some words used by Lord Goddard, C.J., in delivering the judgment of the Court of Criminal Appeal in *Rex* v. *Higgins* (29), in which he said that, in contrast to the prosecutor, local residents could not be regarded as travellers.

For these reasons, I am prepared to accept the statement of the law quoted above from the judgment of Kennedy, J., in *Orchard* v. *Bush* (28), decided more than fifty years ago and followed and applied in subsequent decisions, for example, *Cryan* v. *Hotel Rembrandt* (30). We were referred to several cases decided under the provisions of the Licensing Acts before 1921, but I do not derive much assistance from these decisions, which depend upon the language used in the particular statute in question and the problem of the "bona fide traveller" seeking intoxicating liquor on Sunday. On this part of the case I am in agreement with the judgment of Lynskey, J., who arrived at the same conclusion for substantially the same reasons.

The second defence raised was that the car park was not within "the hospitium" of the inn. [His lordship described the car park, and continued:] The judge found that the plaintiff had not seen or, at any rate, read the notice, and that in any event, if the car park was part of the inn, such a notice would not relieve the innkeeper of his common law liability. The defendant, on appeal, did not seek to rely on this notice as contractually relieving him from liability, and conceded that, if the car park was within the "hospitium", he could not contract out of his liability: but he contended that the "hospitium" of an inn prima facie includes only the inn itself, its stables and (in modern times) its garages, though it may be extended beyond the stables or garages by the innkeeper either by accepting the goods himself

(28) [1898] 2 Q. B. 284.
(29) [1948] 1 K. B. 165.
(30) (1925) 41 T. L. R. 287.

or his servants or by necessary inference from his conduct: see *Jones* v. *Tyler* (31). This extension being within the control of the innkeeper, he can, it is said, exclude by notice the extension which might otherwise have been inferred from the circumstances..

There is no doubt that in former times the " hospitium " was limited to the inn and stables and that the innkeeper was not liable for his guest's horse which was put to pasture by the guest in a field adjoining the inn, but there is no authority which limits the " hospitium " to such parts of the premises as are under cover, and the word " infra " has been treated as equivalent to " intra ".

It is conceded that in modern times the " hospitium " extends to garages, and I can see no reason why it should not include car parks designed and intended for the use of customers paying visits of short duration, just as in former times the gig would be left in the yard on market days. This applies particularly in cases like the present, where the inn, adjoining Watling Street, is obviously catering for motor traffic and where no evidence was given by the defendant as to the existence or extent or situation of any garages in which visitors might place their cars. It is true that in the course of the trial a plan, other than the plan which had been agreed, was received in evidence, and that plan does indicate the existence of some garages at the top of the plan. No evidence was given to explain the situation or nature of these garages or whether they belonged to the defendant or some other person. Therefore I proceed on the basis that there was in fact no evidence of the existence of any garages attached to or forming part of the inn.

The liability of the innkeeper, in my view, extends to the goods of his guest which are placed by the guest in that part of the premises in which such goods are usually taken in the inn. The innkeeper will not be responsible if a motor car is placed by the guest on some part of the inn premises not intended for and unsuitable for the reception of motor vehicles.

This is, I think, the explanation of the old cases, such as *Harland's* case (32), *Brand* v. *Glasse* (33), and *Sanders* v. *Spencer* (34), where a distinction is drawn between an " outyard " and an " inner yard ". If an innkeeper has an " inner yard " more suitable for the reception of carriages or cars, he can no doubt exclude the user for this purpose of an " outer yard ": but, if he has only one yard or car parking space forming part of the inn premises and designed and intended for the use of cars and if he offers no other accommodation for his customers' cars, then I can see no reason why such a space is not within the " hospitium ".

---

(31) (1834) 1 Ad. & E. 522.
(32) Clay. 97.
(33) (1584) Moo. K. B. 158.
(34) (1567) 3 Dyer 266 b.

Furthermore, if liability is to be determined by the structural nature of the yard, I would ask what are the determining features? Must there be a wall or building on all sides of the space or will a wall on two sides or three sides suffice? Suppose the inn building forms one side of the yard, but on two other sides it is bordered by the walls of adjoining buildings, with a gateway or archway leading into the street: is this an inner yard? Unless I can find some guidance from the authorities as to the answer to such questions as these, I prefer what seems to me a more reasonable test: is the place in question a part of the inn premises intended and suitable for user in connexion with some part of the innkeeper's business? And, if I find that it is not only intended and suitable for such purpose, but is the only accommodation available for the particular purpose, then it seems to me that such part of the premises must necessarily be within the " hospitium " of the inn. If an innkeeper holds himself out as willing to receive customers' motor cars on his premises, he is responsible for their safety.

In the present case he so held himself out; there was no evidence of any other accommodation for motor cars; and, in my opinion, the " hospitium " of this inn included the car park and the defendant cannot escape liability for the safety of his guests' motor cars parked in the place intended for them merely by exhibiting a notice such as that described above.

One further matter remains to be dealt with. It was said that one of the plans put in evidence at the trial showed that the only access to the saloon bar visited by the plaintiff was from the outside, and that consequently it did not form part of the premises devoted to the business of an innkeeper. Further inspection of the plan showed that there was apparently access to this bar from the rear, through a courtyard on to which other parts of the premises opened. No evidence was given on this matter at the trial, and the judge did not deal with it in his judgment. The material available is manifestly insufficient to enable us to say that this well-known feature of most inns was not an integral part of the inn premises.

For these reasons, I think that this appeal fails.

ASQUITH, L.J. I agree. Obviously a guest, as against the innkeeper of a common inn, enjoys an anomalous status. The innkeeper is bound, under civil and criminal penalties, to receive him, and, under civil sanctions, to receive, and (subject to the Innkeepers' Acts) to ensure the safety of his goods, so far as they are " infra hospitium "; while, as an offset against these stringent obligations, he has a lien on the goods which the guest brings to the inn.

This appeal raises four questions: first, must a guest, seeking to enforce the stringent liability to which a common innkeeper is subject, be a "traveller"? Secondly, if so, what does the term "traveller" mean? Thirdly, in the present case was the plaintiff a "traveller" in the material sense of that term? Fourthly, if he was, is he on the facts of this case entitled to enforce those strict liabilities?

As regards the first of the four questions formulated above, I think it plain that a plaintiff is not a "guest" for the purpose of acquiring the peculiar remedies which the common law confers as against an innkeeper unless he be also a "traveller". Whatever precise force attaches to that expression, it must apply to him or he goes without these remedies. This is, I think, established beyond question by the following among other considerations: first, the old writ, which in the time of Elizabeth (see *Calye's* case (35)) could alone initiate a claim of this kind, described the plaintiff or plaintiffs as "transiens" or "transeuntes". Secondly, in the field of criminal prosecutions, for not "receiving" the prosecutor, the indictment was bad if it did not contain any allegation that the latter was a treveller (*Rex* v. *Luellin* (36)), and failure to prove that allegation was one of the grounds on which, in *Reg.* v. *Rymer* (37), the Court for Crown Cases Reserved held that the prosecution failed. See also the observations (not, I think, wholly obiter) of Lord Goddard, C.J., in *Rex* v. *Higgins* (38). Thirdly, in the field of civil litigation, since *Calye's* case (39) the allegation that the plaintiff was a "traveller" or "travelling" has been held an indispensable averment in the declaration. It is true that in the old case of *Drope* v. *Thaire* (40) the want of this averment, according, at least, to the case as reported in Norman French, was treated as immaterial; but in *Lamond* v. *Richard and Gordon Hotels, Ld.* (41), the Court of Appeal, basing itself partly on the precedent in Bullen & Leake (3rd ed.), p. 344, clearly affirmed the contrary view. That decision is binding on us.

There are decisions which, concerned with the rights of a guest, are silent on the question whether the person suing as guest was a traveller. There are no decisions which say expressly that anyone can be a guest without being a traveller; and the first-named decisions, in my view, tacitly assume a guest to have fulfilled the qualification necessary to his becoming a guest,

(35) 8 Co. Rep. 32a.
(36) 12 Mod. Rep. 445.
(37) 2 Q. B. D. 136.
(38) [1948] 1 K. B. 165.
(39) 8 Co. Rep. 32a.
(40) (1625) Latch 123.
(41) [1897] 1 Q. B. 541.

namely, that he should have been a traveller. Many of the decided cases, indeed, concern the question whether, or when, he has lost that character, and assume him to have possessed it in the first instance.

The second main question, and a more difficult one, is what precisely the word " traveller " means in this connexion. I think its meaning has in the course of time undergone some modification. According to decisions in Tudor and Stuart times, there might have been some warrant for restricting it to persons who resorted to the common inn for accommodation for the night: see, for example, *Warbrook* v. *Griffin* (42). However long this notion endured, it received its quietus when *Bennett* v. *Mellor* (43) decided that a man who on his way home from Manchester market entered an inn, and had his goods stolen while he was having a drink, was entitled to the special remedies against an innkeeper, there being no question of his lodging at the inn for the night. This decision, more than a century and a half old, has never been overruled, and it seems too late for any agency short of the legislature to overrule it now. What it decides is that, if the plaintiff in transit from another place to his home, resorts to an inn for a meal (or a drink) he is a " traveller ".

So again in *Orchard* v. *Bush & Co.* (44), the plaintiff was held entitled to enforce the special obligations resting on an innkeeper when he stopped at the inn for a meal when en route from his office in Liverpool to his residence some miles outside it. I cannot persuade myself that, if this is so, a person, who travels to an inn from his own residence for a meal or a drink and travels back to his own residence afterwards, is not a " traveller " also.

To this view it is objected that, if it were true, every one visiting an inn would be a " traveller ". I think the answer to this objection is that the term " traveller ", even on this broad construction, is very far from embracing all comers: it excludes, for instance: (a) the innkeeper's family living in the inn, (b) the innkeeper's servants, (c) the innkeeper's private guests, (d) lodgers at the inn, and (e) persons resorting to the inn for purposes unconnected with the enjoyment of the facilities which it provides as an inn, for example, to repair the drains or to sell the innkeeper a sewing machine. This is the gist of Kennedy, J.'s judgment in *Orchard* v. *Bush & Co.* (44), which, whether or not it goes beyond the question immediately in issue, gives an illuminating conspectus of the law. On any other meaning of the word, how can the innkeeper distinguish the traveller, to whom he is under strict liability, from the non-traveller, to whom

---

(42) 2 Br. & G. 254.

(43) 5 Term Rep. 273.

(44) [1898] 2 Q. B. 284.

C. A.
1950

WILLIAMS
v.
LINNITT.

Asquith, L.J.

he is not? On the meaning indicated above, the sheep and goats can at once be told apart.

It is true that in *Atkinson* v. *Sellers* (45) Cockburn, C.J., affirmed for the purpose of the proceedings before him the very distinction which I have ventured for the present purpose to reject. His language is as follows: "Of course, a man could "not be said to be a traveller who goes to a place merely for "the purpose of taking refreshment. But, if he goes to an inn "for refreshment in the course of a journey, whether of business "or of pleasure, he is entitled to demand refreshment, and the "innkeeper is justified in supplying it". But he was dealing (a) with criminal and not civil liability, and (b) under a particular statute of 1854 which prohibited serving persons between certain Sunday hours unless they were travellers.

Such a decision and many others decided under licensing legislation are not directly relevant in a civil action brought on the innkeeper's common-law liability. If the distinction were valid in the different province which we are exploring, more than one of the cases cited to us would have been wrongly decided: for example, the decision of Greer, J., in *Cryan* v. *Hotel Rembrandt, Ld.* (46), where the guest of an hotel guest was held a guest (and therefore by implication a traveller) vis-à-vis the hotel-keeper, whereas she had done no more than dine with the hotel guest, intending no doubt to return home afterwards.

I am therefore of opinion that Mr. Gardiner has established that the plaintiff was a "traveller".

It does not, however, follow that the innkeeper, the defendant, was in the present case subject to the strict innkeeper's liability in respect of the plaintiff's car, having regard to the place where the plaintiff left it. The absolute liability of the innkeeper for the safety of the plaintiff's goods only attaches where such goods are "infra hospitium", namely, within the inn buildings themselves or within precincts so intimately related to those buildings as to be treated for this purpose as forming part of them. Stable buildings or garages annexed to the inn, or inner courts enclosed by its walls, have been so treated. Goods placed within these limits by the traveller are "infra hospitium" and, except by notice under the Innkeepers' Acts and to the extent that such a notice operates, the innkeeper cannot limit his absolute liability in relation to them. He cannot by a special agreement contract out of his strict liability. This is, I think, implicit in the decided cases. If, on the other hand, the traveller places his property in some outlying area which is not actually or constructively part of the inn, but, for example, deposits his

---

(45) (1858) 5 C. B. (N.S.) 442.

(46) 41 T. L. R. 287.

C. A.
1950
WILLIAMS
v.
LINNITT.
Asquith, L.J.

luggage in what was called in *Harland's* case (47) an "outyard" adjacent to the inn, the "hospitium" has been held in some of the older cases not to extend to these things; the innkeeper is not absolutely liable for their loss; and he can freely limit his liability (which would not prima facie exceed that of a bailee) in respect of them by special contract; though, if it is not the guest but the innkeeper himself who puts the guest's goods in such an outlying area, or invites the guest to put them there, he may by his act extend the "hospitium" to cover that area, as, for example, in *Jones* v. *Tyler* (48), where the innkeeper left the guest's gig in a public street outside the inn. On this branch of the case I agree with the conclusions of my Lord.

I would add that, whatever the older cases may say, in my view it is today a question in substance of fact whether a debatable area is part of the inn, including in that term the original "hospitium" or any extension of it. The most material facts in this case are that the area, being an area contiguous to the inn, is one in which the guest with a motor car is invited to leave it; that there is no evidence that any other accommodation belonging to the inn is provided for cars, though a garage was marked as being in the neighbourhood of the inn on a plan which was not agreed or proved; and that it is part of the innkeeper's normal business to provide for guests who arrive in cars. These circumstances are very strong evidence that the area is within the "hospitium", and, as I read the judgment, the judge has so found.

If I am wrong in thinking that the question is substantially one of fact, I consider that the conclusion which the judge has reached on this point is the right legal inference from the circumstances referred to, and, if his conclusion is right, the strict liability attached and could not, in my view, be displaced by such notice as was put up in the car park, which, incidentally, would be quite invisible at 9 p.m. on a February night. For these reasons, and those given by my Lord, I agree that the appeal, though very attractively argued, should be dismissed.

DENNING, L.J. No one can doubt that the special rights and obligations between innkeeper and guest depend upon the guest being a traveller. That appears from the original writ, which, Lord Coke says, "is in such case the ground of the common "law": see *Calye's* case (49); also from the form of declaration which is set out in Bullen & Leake (3rd ed.), p. 344; and from the form of indictment where an innkeeper is charged with refusing accommodation at his inn: see *Rex* v. *Luellin* (50) and

---

(47) Clay. 97.
(48) 1 Ad. & E. 522.
(49) 8 Co. Rep. 32a.
(50) 12 Mod. Rep. 445.

Reg. v. *Rymer* (51). But the question which we are asked to decide is when a man can properly be said to be a traveller.

In the sixteenth and early seventeenth centuries, in order to be a traveller, a man had to " lodge " in the inn, that is to say, he had to stay the night or, at the least, engage a room for the night: see *Warbrook* v. *Griffin* (52); and he had not to stay more than three nights, because, if he did so, he ceased to be a lodger and became a boarder: *Gulielm's* case (53); *Harland's* case (54).

This test had the merit of simplicity and certainty, and was entirely in keeping with the distinction between an alehouse and an inn, which was, and still is, that a common inn implies ability to give a lodging to those who wish to stay the night: *Stephens* v. *Watson* (55); and, naturally enough, only those were considered travellers who wished to avail themselves of this essential facility. The test of staying the night was not only necessary, but also sufficient, to make a man a traveller: so long as he stayed the night, it did not matter whether he was in the middle of his journey or at the end of it: *Drope* v. *Thaire* (56); nor did it matter whether he came from near or from far. The old cases all recognize that a neighbour who only comes a mile or two, but who stays the night, is a traveller; for they are at pains to say that he is not a traveller when he comes as the invited friend of the innkeeper. So in 1583 in *Carr's* case (57) it was held that " if an innkeeper invites a man to supper and, the night being " far spent, he invites him to stay the night, if he is afterwards " robbed, yet the innkeeper will not be charged for it, because " that guest is not a traveller ".

Lord Coke in his celebrated discourse on *Calye's* case (58), first published in 1611, though the case was decided in 1584, makes the same point: " If a neighbour, who is no traveller, as " a friend, at the request of the innholder lodges there and his " goods be stolen, he shall not have an action ".

The implication clearly is that, if he comes, not as an invited friend, but as a member of the public, he is a traveller, even if he comes from near at hand. There is much good sense in this, because the innkeeper in a large town like London did not, even in those days, know all the people in the place; and, if one of them came and asked to stay the night, the innkeeper might not know the man or how far he had come, and he had no right to ask him those particulars; so he had no ground on which to refuse him accommodation. Accordingly, it was held that, if the man did stay the night, he was a traveller and the innkeeper was

(51) 2 Q. B. D. 136.
(52) 2 Br. & G. 254.
(53) Latch 88.
(54) Clay. 97.
(55) (1702) 1 Salk. 45.
(56) Latch 123.
(57) 1 Roll. Ab. 3 (e).
(58) 8 Co. Rep. 32a.

entitled to a lien on his goods. This was so well settled that on one occasion later on, when it was suggested that he was not a traveller, the court treated the point as not worthy of notice: see *Thompson* v. *Lacy* (59).

The simplicity of the sixteenth century test was, however, lost in the succeeding periods. On the one hand, the three days were extended indefinitely. Lawyers at the assizes and gentlemen at the horse races upon occasion stayed more than three nights and were still held to be travellers: see the notes to *White's* case (60) and *Harland's* case (61); but, of course, a guest might still stay so long that he ceased to be a traveller and became a boarder: *Lamond* v. *Richard* (62). On the other hand, the requirement that he must stay at least one night at the inn ceased to be effective.

The first inroad on it was in 1703, when three judges held, against Holt, C.J.'s opinion, that if a traveller leave his horse at an inn, and lodge elsewhere, he is a guest "because it must "be fed by which the innkeeper hath gain": *York* v. *Grindstone* (63). This obviously opened the way for the view that, when a traveller took advantage of accommodation provided by an inn, the relationship of innkeeper and guest arose even though he did not stay the night; and that is the way in which the law did in fact develop.

In *Bennett* v. *Mellor* (64) a man was on a journey in the sense that he had come into Manchester on a market day and was on his way to his home in the country, but he had no intention of staying the night and he only had a drink at the inn. Yet it was held that the relationship of innkeeper and guest arose. The effect of that case was stated by Mr. J. W. Smith in 1837 in the first edition of his Leading Cases in these words: "It is not "necessary in order that a man may be a guest, so as to fix the "innkeeper with this sort of liability, that he should have come "for more than a temporary refreshment". That note has been retained untouched by all subsequent editors, including Willes and Keating, JJ., and Lord Collins, and has been accepted as good law for more than a hundred years. It was quoted and adopted by Kennedy, J., in *Orchard* v. *Bush* (65), and cannot now be called in question. Mr. Elwes did not, indeed, question it, but he said that it must be confined to a man who was a traveller in the ordinary sense of the word, that is, he must at least be on a journey of some kind or other, be it only a journey from his office to his home, and that it was not sufficient if he was merely a local resident dropping in for a drink.

(59) 3 B. & Ald. 283.
(60) (1627) 2 Dyer 158 b.
(61) Clay. 97.
(62) [1897] 1 Q. B. 541.
(63) 1 Salk. 388.
(64) 5 Term Rep. 273.
(65) [1898] 2 Q. B. 284.

There is very considerable authority in favour of Mr. Elwes' contention. Lord Coke would certainly not have held that the local resident who drops in for a drink was a traveller. He would have dismissed him as a tippler: see *Warbrook* v. *Griffin* (66); so would Watson, B.: see *Pidgeon* v. *Legge* (67); and Kelly, C.B.: see *Reg.* v. *Rymer* (68); and the present Lord Chief Justice, Lord Goddard: see *Rex* v. *Higgins* (69).

But upon reflection I do not think that we can take that view. Once it is accepted that a man, who comes for temporary refreshment whilst on a journey, is a traveller, there is no practical way of distinguishing him from the local resident. Just as the old lawyers of the sixteenth century found that they could not dismiss the neighbour unless he came as an invited friend of the innkeeper, so we cannot dismiss the local resident unless he comes as an invited guest, and for the selfsame practical reason: that the innkeeper may often not know whether the man is a local resident or not, or whether he is on a journey or not; and the innkeeper has no right to ask him for those particulars. Yet if the man should be on a journey, the innkeeper dare not refuse him, under pain of being brought before the criminal courts; and, if he is bound to accept him, then he should have a lien for his charges and correspondingly should be liable for the safe custody of his goods.

It was, of course, easy enough for Lord Coke to dismiss the tippler, because in his day a man, to be a guest, had to lodge in the inn, which the tippler did not do. He did not stay the night. But since his time the courts have opened the door of the inn to the man who stops for a drink on his way home; and once he gets his foot in, the door cannot be shut against the local resident; for it is beyond the wit of man to know the one from the other.

In the course of the argument Asquith, L.J., put the case of two men walking home from work. Both go to the same inn for a drink; but the home of one is on the hither side of it and the home of the other is on the further side. Is one a traveller and the other not? Such illustrations convince me that we cannot accept Mr. Elwes' contention, and we must hold the plaintiff to be a traveller.

The second question that we have to decide is whether an innkeeper can contract out of his liability to keep safely the goods of his guest. In the seventeenth and eighteenth centuries an innkeeper could not lawfully contract out of his liability for goods which were brought by the guest within the precincts of the inn. There was a very good reason for this rule. It was because the innkeeper was obliged to accept the goods, and the law would not allow him to derogate from his obligation by attaching conditions to his acceptance. If he refused to accept the goods except at the owner's risk, he was in effect refusing to honour the obligation which the law imposed on him; and that he was not allowed to do. Holt, C.J., made this clear in 1691, when he said that innkeepers "are bound to keep safely and answer all neglects . . . "and so they would be, though they should expressly caution "against it": *Lane* v. *Cotton* (70). Similar reasoning was applied in those days to common carriers, for in the Dialogue between Doctor and Student you will find it said that "if the "carrier would perchance refuse to carry goods, unless promise "were made unto him that he shall not be charged for any misdemeanour that should be in him, the promise were void, for "it were against reason and against good manners, and so it is "in all other cases like": see Dial. II, ch. 38.

---

(66) 2 Br. & G. 254.

(67) (1857) 21 J. P. 743.

(68) 2 Q. B. D. 136.

(69) [1948] 1 K. B. 165, 171.

The law as to common carriers was afterwards altered by the judges, who allowed such carriers to make special contracts exempting themselves from all liability. This was a retrograde step, which was regretted by Lord Ellenborough in 1804, when he said: "We cannot do otherwise than sustain such right [to "contract out] in the present instance, however liable to abuse "and productive of inconvenience it may be; leaving to the legislature if it shall think fit to apply such remedy hereafter as "the evil may require": see *Nicholson* v. *Willan* (71); and ultimately Parliament did step in to prevent the carriers from imposing unreasonable conditions: see the history of the law on this matter, set out in *Peek* v. *North Staffordshire Ry. Co.* (72), per Blackburn, J.

The law as to common innkeepers was, however, never altered by the judges. No retrograde step was taken there. Innkeepers have never been allowed to contract out of the liability imposed on them by the custom of the realm. It is true that this involved them in hardships and Parliament passed the Innkeepers Liability Act, 1863, to protect them in some respects; but the very passing of that Act implicitly affirms the rule that at common law they cannot make a special contract out. So the law still is that, in respect of goods brought within the precincts of the inn, the innkeeper cannot contract out of the liability which the common law imposes upon him. No one disputed this before us, but the matter is of such importance that I think that we should declare it specifically.

The third question is what are the "precincts of the inn" for which the innkeeper is strictly liable. Lord Coke said in *Calye's* case (73) that "the innholder, by law, shall answer for

(70) 1 Salk. 17.
(71) (1804) 5 East 507, 513.
(72) 10 H. L. C. 473 et seq.
(73) 8 Co. Rep. 32a.

"nothing that is out of his inn, but only for those things that "are infra hospitium". This is still the law, but we are left with the question: what is infra hospitium? The two extremes are clear. First, everything which is under the cover of the inn buildings is infra hospitium. Lord Coke says that "the innholder is bound to answer for himself and for his family, for the "chambers and stables; for they are infra hospitium". That is clear enough. Everything within the house and stables, or, in these days, the house and garage, is infra hospitium.

Secondly, nothing which is outside the curtilage of the inn is infra hospitium. Thus, a piece of pasture, which is outside the inn, is not infra hospitium. That was decided in *Calye's* case (73), where an innkeeper was held not liable for his guest's horse which was stolen from the pasture. The reason, as Lord Coke said, is "because the horse, which at the request of the "owner is put to pasture, is not infra hospitium".

But suppose that, instead of a piece of pasture, there is a piece of open land outside the inn, and the innkeeper, at the request of the owner of a motor car, allows him to leave his car on the open space: is the innkeeper liable, if the car is stolen? Clearly he is not liable in the case of the car any more than he is in the case of the horse. Suppose, then, that it becomes a regular thing for owners, with the permission of the innkeeper, to tether their horses in the pasture or to leave their cars in the open space: is the liability of the innkeeper to be thereby increased? I think not. In each case the innkeeper allows his guests to use the pasture or the open space for their own convenience, but it is not part of the inn, and so he is not liable as an insurer in respect of them, but only for negligence: *Mosley* v. *Fossett* (74).

There is one obvious exception to this extreme. It is this: the innkeeper is strictly liable if he accepts a horse or carriage into his charge as innkeeper and then himself leaves them outside the curtilage of the inn. Such was the case put by Lord Coke of the innkeeper who, of his own head, puts his guest's horse to grass, and the case of the gig, of which the ostler took charge and then left it in the street outside the inn: see *Jones* v. *Tyler* (75).

In between the two extremes lies the present case. What is the position of an outer yard or car park which is within the curtilage of the inn, but is not under cover of the buildings? Such a place is undoubtedly part of the inn, because it is provided by the innkeeper for the use of his guests; but, unlike the stables or garage, it is not a suitable place for the guests to leave their horses or cars for the night. In most inns there is, or should be, a stable or garage in which travellers can put their horses or cars for the night, for, as I have already said, a common inn implies ability to give a lodging for those who wish to stay the night, and that implies ability to stable the horse or garage the car. The Royal Red Gate Inn in Watling Street apparently provides such accommodation, for it has, according to one of the plans which was handed in at the trial, a double lock-up garage at the back.

---

(73) 8 Co. Rep. 32a.

(74) (1598) 1 Roll. Ab. 4 (5).

(75) 1 Ad. & E. 522.

But we have now to consider the car park in the front, which is obviously not a suitable place to leave a car for the night. The car park is not provided for travellers who stay the night, who were the only travellers for whose benefit the common law imposed a strict liability on innkeepers. The car park is provided for travellers who stop for a meal or for a drink, who have only become entitled to be considered travellers by a comparatively recent innovation. Inasmuch as it is provided for these last, I should not myself be disposed to consider it infra hospitium, if I could avoid it, because it means yet another extension of the strict liability of innkeepers, which has gone far enough already. But I must acknowledge the force of the arguments to the contrary. I can well see that, once tipplers and diners are admitted to be travellers, it is logical enough to say that a car park which is provided for them is infra hospitium. It is, so to speak, an extended hospitium due to the extended notion of a traveller. This court seems to have proceeded on that footing in regard to the forecourt of the Friary Hotel at Derby; and I can see no satisfactory distinction between a forecourt and a car park. I agree, therefore, that the car park was a prima facie infra hospitium.

The fourth question is whether an innkeeper can protect himself by putting up a notice that he will not be responsible for cars in the car park. If an innkeeper cannot protect himself by notice, it will be a serious matter, because horses and carriages (including cars) are the only things for which an innkeeper is liable for the full value if they are stolen. Parliament has enabled him to limit his liability for everything else to 30*l.*, by putting the proper notice up in the hall of his inn; but that parliamentary limit does not apply to cars. If he has no means of protecting himself in respect of the car park, it means that not only guests who stop for a drink during the day, but also those who come for a meal during the hours of darkness, will be able to leave their cars for a long time in the car park, without telling the innkeeper anything about them, and hold him liable for their full value if they are stolen. The innkeeper will not be able to say that the guest was negligent in leaving the car there, because the guest will be able to say, quite rightly, that it was infra hospitium and he was entitled to leave it there, even during the hours of darkness: see *Gee, Walker & Slater, Ld.* v. *Friary Hotel* (76); so that, if carried to an extreme, this responsibility would mean that an innkeeper ought to have an attendant to watch over cars in the car park—all night, if need be. I do not think that we are compelled to carry the law to such a length.

There are cases in the books which show that the innkeeper can at common law protect himself by notice in the case of yards which are unprotected and open to the street. The first was a case decided in 1564, which was vouched for in *Brand* v. *Glasse* (77): " A clothier came to an inn with his waggon of wool " to lodge there, and on his entry the innkeeper said to him that, " if he wished that he should undertake the charge of his waggon, " he should draw it into the inner court or otherwise he would not " be responsible for it; and the clothier did not do it. The wool " was stolen and the clothier brought an action; and for this " special matter the innkeeper was discharged ". The same result was reached three years later (1567) in *Sanders* v. *Spencer* (78), where a clothier came to an inn at Brodeway and, notwithstanding the warning of the innkeeper, laid his packages "in an outer court at large ", where they were stolen; and the innkeeper was held not liable.

These cases can be explained, if you please, on the ground that the loss was due to the guest's own fault; but the better ground seems to be that, when the goods were placed in an outer court that was open to the street, the innkeeper was entitled to give notice that he would not be responsible for their safety. If they had been placed under cover within the precincts of the inn, the innkeeper could not have escaped liability by giving notice that he would not be responsible; for that would be an attempt to contract out of his strict liability, which is not allowed. But when they were placed in the outer yard, the notice was effective.

That was certainly the interpretation put upon these cases by Serjeant Whitfield in *Harland's* case (79), where " it was " holden that, though an innkeeper say he will not keep the " guest's goods unless he will put them under lock and key, this " shall not help the innkeeper, for he is bound by law to keep " them safe; and so it differs from packs put in an outyard, where " such words will serve the innkeeper ".

The notice in such cases is not contractual: it is a limitation which the innkeeper is allowed to put upon his strict liability, because of the obvious risk involved if the goods are put in that place. It takes the place, so to speak, out of the hospitium, so that the innkeeper is not liable as an insurer in respect of it, but only for negligence. It is a common law notice parallel to the modern parliamentary notice.

---

(76) (1950) 66 T. L. R. (Pt. 1) 59.

(77) Moo. K. B. 159.

(78) (1567) 3 Dyer 266 b.

(79) Clay. 97.

To apply the principles of those old cases to the present case: the car park at the Royal Red Gate Inn was at least as unsafe as any outer yard. It had the whole of one side open to the street for a distance of seventy-five feet, and was more in the nature of a " good pull-in for carmen " than anything else. It was so laid out as to be a convenient place for guests to leave their cars, but palpably not a safe place. There was no attendant there; nor would you expect one at a small roadside inn like this. It was obviously no safer than a street parking place. In short, even if there was no notice up there, it was not a place where anyone could reasonably suppose that the innkeeper took full responsibility on himself for cars that were left there, especially during the hours of darkness. But there was in fact a notice. The innkeeper had put up a notice in a suitable and prominent place, quite plain for anyone to read if he chose to do so: " Car Park. Patrons Only. Vehicles are admitted to this " parking place on condition that the Proprietor shall not be " liable for loss of, or damage to, (a) Any vehicle; (b) Anything " in, or on, or about any vehicle, however such Loss or Damage " may be caused ".

I think, following the old cases, that that notice was effective to protect the innkeeper from his strict liability. It is true that the notice did not operate as a contract—at any rate, not in the case of the plaintiff, who came by night and did not read it; but the plaintiff cannot make anything of that, because he never made a contract by which he put the car there. He never told the innkeeper it was there at all. If he had asked the innkeeper if his car would be safe there, the innkeeper might well have said, just as the innkeeper did in *Brand* v. *Glasse* (80): " If you wish me to undertake the charge of your car, you should " take it into one of the garages which I have at the back of the " inn, or otherwise I shall not be responsible. There is a notice " up there which says that I am not responsible for the car " park ". If such a conversation had taken place and the plaintiff had nevertheless put his car in the car park and it was stolen, I should have thought it plain that the innkeeper would not be liable. That would be good sense and good law, on the authority of *Brand* v. *Glasse* (80) and *Jones* v. *Tyler* (81), *per* Taunton, J.

But can the plaintiff be in any better position when he did not so much as ask the innkeeper if the car would be safe there? Should not the notice then serve the innkeeper? I think that

(80) Moo. K. B. 158.

(81) 1 Ad. & El. 522, 525.

C. A.
1950
WILLIAMS v. LINNITT.
Denning, L.J.

it does. It cannot be suggested that it was the duty of the innkeeper to tell the guest that there was a double lock-up garage available at the back, because, after all, the guest did not even tell him that he had come in a car; and, even if the innkeeper had told him that there was a garage available, it is very unlikely that the guest would have put his car in it, especially if there was a charge for it. The guest who came in for a drink would, no doubt, have taken the risk and left it in the car park. So why should he be better off because there was no such conversation? I think that he is not. I think that the notice takes the place of the imaginary conversation. It expresses a limitation on his strict liability, which, in my opinion, an innkeeper is by law permitted to make in the case of an open yard or car park where there is an obvious risk of theft; and, in order to have the benefit of it, it is not necessary for the innkeeper to prove that he had garage accommodation available, at any rate as against a guest who did not ask for it. The risk of theft should not fall on the innkeeper any more than it does on the keeper of an ale-house or a restaurant or a cinema who provides accommodation for the cars of his customers. It should fall on the owner of the car, who can and usually does insure against loss of his car however and wherever it takes place.

I would therefore be in favour of allowing the appeal, on the ground that this was palpably not a safe place to leave a car and that the innkeeper was entitled to protect himself from strict liability by the notice that he put up.

Appeal dismissed.
Leave to appeal to House of Lords.

A. W. G.

Solicitors: *J. E. Lickford & Sons; L. Bingham & Co.*

REX *v.* PARRY AND OTHERS.

C. C. A.
1950
Nov. 27.
Lord Goddard C.J., Hilbery and Parker, JJ.

Criminal law—Sentence—Probation order—Fine not to be imposed on making of probation order—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 3, *sub-s.* 1*; s.* 11, *sub-s.* 2*; s.* 13.

A court has no power, on making a probation order, to impose a fine.

APPEALS against sentences.

The appellants were convicted of larceny at Leicester City Sessions. They were each ordered to pay a fine of 25*l.* and put on probation for two years. They now appealed against those orders.

G. H. Dixon for the appellants. By s. 3, sub-s. 1, of the Criminal Justice Act, 1948 (1), a court may only make a probation order *instead of* sentencing an offender. An order to pay compensation is a sentence: *Rex* v. *Jones* (2). A fortiori a fine is a sentence. It is true that s. 13 of the Act of 1948 provides that a court shall have power to fine an offender "in addition to "dealing with him in any other manner in which the court has "power to deal with him". The contradiction between that section and s. 3, sub-s. 1, can only be resolved by considering the effect of s. 13 to be limited by s. 3, sub-s. 1. If it had been intended that a fine could be imposed on the making of a probation order particular provision would have been made to that effect. By s. 11, sub-s. 2, particular provision was made for ordering an offender to pay compensation when a probation order was made against him. But such compensation is not a fine. By s. 11, sub-s. 3, an order for the payment of compensation is only enforceable as an order for costs: see the Costs in Criminal Cases Act, 1908, s. 6, sub-s. 5. As special provision was made for such an order for compensation, but not for imposing a fine on making a probation order, it is clear that the legislature did not intend such fines to be imposed.

---

(1) Criminal Justice Act, 1948, s. 3, sub-s. 1: "Where a court by or before "which a person is convicted of an "offence (not being an offence the sen-"tence for which is fixed by law) is of "opinion that having regard to the "circumstances, including the nature "of the offence and the character of "the offender, it is expedient to do "so, the court may, instead of "sentencing him, make a probation "order, that is to say, an order "requiring him to be under the "supervision of a probation officer "for a period to be specified in the "order of not less than one year nor "more than three years".

Section 3, sub-s. 3, provides that the person put on probation may be required to comply with certain requirements: "Provided that (with-"out prejudice to the power of the "court to make an order under "sub-s. 2 of s. 11 of this Act) the "payment of sums by way of "damages for injury or compensa-"tion for loss shall not be included "among the requirements of a pro-"bation order".

Section 11, sub-s. 2: "A court, on "making a probation order or an "order for conditional discharge or "on discharging an offender ab-"solutely under this Part of this "Act, may, without prejudice to its "power of awarding costs against "him, order the offender to pay such "damages for injury or compensation "for loss as the court thinks reason-"able; but, in the case of an order "made by a court of summary juris-"diction, the damages and compen-"sation together shall not exceed "100*l*. . . .".

Sub-section 3: "An order for the "payment of damages or compensa-"tion as aforesaid may be enforced "in like manner as an order for the "payment of costs by the offender ". . .".

Section 13: "Any court before "which an offender is convicted on "indictment of felony (not being a "felony the sentence for which is "fixed by law) shall have power to "fine the offender in lieu of or in "addition to dealing with him in "any other manner in which the "court has power to deal with him".

(2) [1929] 1 K. B. 211.

J. P. Stimson for the prosecution. Provision was made in the widest terms by s. 13 for imposing a fine whatever other order was made. Section 3, sub-s. 1, must be construed as being subject to that section.

LORD GODDARD, C.J. The question which arises in these cases is whether, on making a probation order, the court can at the same time impose a fine. It is a point of some importance, because some courts of quarter sessions have been in doubt about it.

Section 3, sub-s. 1, of the Criminal Justice Act, 1948, entitles the court " instead of sentencing " the defendant to make a probation order. " Instead of sentencing him " there means " instead of punishing him ", and the section, of course, entitles the court to make a probation order instead of imposing a fine.

If a probation order is made and the terms of the probation order are broken, the defendant can be brought back and sentenced by the court which has convicted him for the offence for which he had been convicted: see s. 3, sub-s. 5, and s. 6.

By s. 11, sub-s. 2, a court, on making a probation order, may order the offender to pay damages for injury or compensation for loss, and by sub-s. 3 such order may be enforced in like manner as an order for the payment of costs by the offender, that is to say, as a civil debt and not in any way as an offence carrying the sanction of imprisonment or other punishment administered corporally. Damages or compensation are in no sense a fine: a fine can always be enforced by imprisonment, but damages or compensation cannot unless the provisions of the Debtors Act, 1869, are applicable.

The only provision which causes any doubt is s. 13, by which a court that has convicted a person on indictment for felony has power to fine him " in lieu of or in addition to " taking other action. The history of that section and the reason for importing it into the Criminal Justice Act, 1948, are well known. There were certain felonies, principally under the Larceny Act, 1916, for which a court of summary jurisdiction had power to fine. That was because it was considered desirable in the case of petty thefts that a court should be able to fine and not send to prison; but in cases which came before a court of assize or of quarter sessions on indictment there was no power to fine until the Act of 1948, except in the case of manslaughter. The reason for that exception was that any form of homicide was felony if it were not justified, and, as is well known, the offence of manslaughter is one which varies enormously in seriousness and the circumstances in which it is committed. It may be approaching murder or it may be of the most technical description, so that by the Offences against the Person Act, 1861, s. 5, the felony of manslaughter could be punished by a fine; and until 1948 it was the only felony that could be punished in that manner. But it then seemed, not only to the judges, but to other persons interested in the administration of the criminal law, that it was unfortunate that the old common law still prevailed which prevented the court from fining for felony. Over and over again one has been met at assizes with an offence which technically was a felony and for which one would have been very glad to have imposed a fine as some punishment, but the courts had not the power to do so. The court was very often, therefore, left in the position that it had either to send a person of hitherto excellent character to prison for a comparatively small offence or else bind that person over, which was inflicting no punishment. That is the reason why Parliament by the Act of 1948 gave to courts of assize and quarter sessions the same powers which courts of summary jurisdiction had in certain cases and which they now have in all cases of felony, that is to say, the power of imposing a fine instead of sending to prison.

But we cannot, I think, possibly read s. 13 as applying to s. 3, sub-s. 1, because they would be contradictory, and it is not necessary for the true construction of s. 13 to give it an effect contradictory to that preceding provision. By s. 11, sub-s. 2, it is quite clear, the court has power to order the payment of sums of money not by way of punishment but by way of compensation. I emphasize the words "not by way of punishment", because if it were by way of punishment there would be provision made for inflicting a sentence of imprisonment in default. It might be argued that the Act provides that if a person fails to comply with one of the terms of a probation order he will be liable to be sentenced for the original offence: see s. 3, sub-s. 5, and s. 6, and that he might be sentenced to imprisonment if he failed to pay a fine imposed when a probation order was made under that provision; but as Mr. Dixon has pointed out, that cannot be the true construction of the Act, because the court would have no power to punish the offender a second time for the offence for which he had already been punished by the infliction of a fine.

In the opinion of the court it is plain, when one considers the group of sections concerned with probation, that the words in s. 13 "or in addition to dealing with him in any other manner "in which the court has power to deal with him" cannot include making a probation order. If the court makes a probation order it has no power to fine. If it decides to fine it cannot make a probation order. Consequently these sentences which have been imposed cannot stand.

C. C. A.
1950
REX
v.
PARRY.

We are not going in this case merely to let the probation orders stand: we think that the fines should stand. What the recorder should have done, if he decided to fine, was to impose sentences of imprisonment in default. As the court has power in any case to pass, in substitution for a sentence which was defective or illegal, a sentence which in its opinion ought to have been passed, we shall set aside the probation orders and leave the fines standing, with a penalty of three months' imprisonment in the case of each in default of payment.

Appeals allowed.

Solicitors: *Registrar, Court of Criminal Appeal; Town Clerk, Leicester.*

R. P. C.

C. A.
1950
Nov. 28.
Cohen, Asquith and Denning, L.JJ.

MacDONALD v. GREEN.

Gaming and wagering—Bets on horse-racing—Money lent to loser to pay losses—Contractual obligation so to use money lent—Gaming Act, 1892 (55 *&* 56 *Vict. c.* 9), *s.* 1.

Where X, at the request of Y, pays directly to the winner Y's betting debts, or hands the money to Y by way of loan, it being a term of his contract with Y that the money shall be used to pay off to the winner Y's losses on bets, in either case, the money is irrecoverable by X from Y, since the money was paid by X on a promise by Y to pay him in respect of a contract rendered null and void by the Gaming Act, 1845, within the meaning of s. 1 of the Gaming Act, 1892.

Tatam v. *Reeve* [1893] 1 Q. B. 44 (approved in *Saffery* v. *Mayer* [1901] 1 K. B. 11), followed.

Secus, if, when X hands the money to Y by way of loan, although both contemplate that the money will probably be used to pay off Y's losses on bets, there is no stipulation to that effect: see *In re O'Shea; Ex parte Lancaster,* [1911] 2 K. B. 981.

The direction to the jury by a judge on this issue should be similar to that of Erle, J., approved by the Court of Exchequer Chamber (on another statute) in *Hill* v. *Fox,* (1859) 4 H. & N. 359.

Ex parte Pyke, in re Lister, (1878) 8 Ch. D. 754, decided before the passing of the Gaming Act, 1892, is no longer law.

APPEAL from Slade, J.

The plaintiff, W. H. MacDonald, was the managing director of a company known as Hector MacDonald, Ld., which carried on business as bookmakers and commission agents. Of the 500 1*l*. shares the plaintiff owned 400 and the balance were held by members of his family. In June, 1949, after a meeting at Ascot, the defendant owed the company 4,020*l*. for losses on betting transactions. The plaintiff pressed for payment and by the end of July was threatening to report the defendant, who was a professional backer, to Tattersalls. The plaintiff was the only witness at the subsequent trial, and Slade, J., said that, obviously, he was a witness of truth. The plaintiff said in the box that the defendant on July 29, speaking on the telephone, said that he had been badly let down and that temporarily he was unable to pay. He replied: "I shall have to warn you off, Jack, because "you cannot go on like this", and the defendant then asked the plaintiff if he would lend him the money privately. "In that "case", he said, "I will pay you back weekly and sign any "agreement you like to have drawn up". The defendant offered 200*l*. a week, but the plaintiff said that that was too much and agreed to accept repayment at the rate of 80*l*. a week.

The plaintiff was cross-examined for the purpose of showing that the suggestion of a private loan came from him, but he repeated his evidence that this was not so. On the same day the defendant wrote to the plaintiff: "Herewith the first of "the eighties. Send on your agreement and I will sign on the "dotted line. Thanks a million for your kindness". On that day, too, the plaintiff instructed his solicitor to draft a document for the defendant to sign. He also wrote out a cheque drawn on his own banking account for 4,020*l*. in favour of the defendant; it was an "order" cheque, crossed "and Co. Not negotiable".

On July 30, 1949, a servant of Hector MacDonald, Ld., handed to the defendant the cheque and the following draft letter, headed by the defendant's address: "I beg to acknowledge "receipt of cheque value 4,020*l*., by way of loan, which sum "I undertake to repay to you by weekly instalments of 80*l*. each "on the Monday of each week commencing on August 1, next, "and continuing on the Monday of each week thereafter, until "such time as the said sum of 4,020*l*. shall have been repaid "by me to you. Provided always that, in the event of any "instalment being in arrear for three days, whether demanded "by you from me or not, then the whole of the balance of the "said sum of 4,020*l*. then remaining outstanding shall become "immediately due and payable by me to you". The defendant signed the letter over a 6*d*. stamp, endorsed the cheque and handed both documents back to the company's servant. The cheque was paid into the company's bank account.

The defendant asked if he might continue to bet with the company and, this having been permitted, he did so and, according to the plaintiff, won and was paid 4,000*l*. By instalments he paid off 2,160*l*. of the loan, but then defaulted, and on April 3, 1950, the plaintiff sued him by a specially endorsed writ for 1,860*l*., the balance of money lent.

Particulars were demanded and given as follows: "The "agreement for the loan was made orally on or about July 29, "1949, and was confirmed by the defendant in writing on "July 29, 1949, and signed by the defendant on July 30. The "money was lent to the defendant on July 29, by cheque and "made payable to him".

By the defence it was pleaded: "(1.) No money was ever lent "by the plaintiff to the defendant; (2.) the money alleged to "have been lent to the defendant was money which the plaintiff "purported to pay, or in the alternative paid to Hector Mac-"Donald, Ld., of which company the plaintiff is director and "principal shareholder, in discharge of bets made by the "defendant with Hector MacDonald, Ld., which said bets were "contracts by way of gaming and wagering rendered null and "void by the Act 8 & 9 Victoria c. 109". The Gaming Act, 1892, was not mentioned in the defence but Slade, J., said that, if it were necessary, he would have given leave to amend, but that, in any event, if the evidence showed that the transaction was within the mischief aimed at by the Gaming Acts, it would be the duty of the court to give effect to the provisions of those Acts.

The plaintiff at the trial was asked by counsel in cross-examination: "(Q.) There was no intention at all that the cheque "should be kept by Mr. Green, the defendant? (A.) None what-"ever. (Q.) There was no intention that he should pay the cheque "into his own account? (A.) None whatever. (Q.) It was at all "times the understanding that the cheque should be merely "endorsed on the back by Mr. Green and returned for payment "into the company's account? (A.) That was exactly his idea. "He drew the whole thing up himself. (Q.) I want to get that "quite clear. It was at all times the intention that your cheque "should be paid into the company's account? (A.) That is "correct".

At the close of the re-examination, Slade, J., said to the plaintiff: "You do not dispute that you would not have lent "the 4,020*l*., except on the terms that it should be used to dis-"charge the defendant's indebtedness to your company? (A.) "When Jack Green put it to me the way he did and explained "it to me, you are quite correct, my Lord. (Q.) Never mind "whose suggestion it was. The whole agreement, according to "you was that the money should be lent, not for him to spend "on a holiday in the South of France, but to pay the company. "(A.) Definitely".

It was contended for the defendant that the money claimed by the plaintiff could not be recovered by reason of s. 1 of the Gaming Act, 1892 (1).

Slade, J., who had been supplied with a copy of the transcript of shorthand notes of the cross-examination of the plaintiff but not with a transcript of the notes of his own two questions to the witness and the answers to them, said that he had no doubt that, when the plaintiff agreed to make this loan, he did so with the intention that the defendant should use the money to discharge the defendant's liability to the company and that the defendant had the like intention. But he found that this was no term of the arrangement for the loan or of the contract for the loan, if ever there had been a contract for the loan properly so-called, i.e., for any consideration moving from the defendant. It was one thing to have an understanding or to have in addition a mutual common intention; it was another to make any such intention, or the carrying out of any such reciprocal intention, a stipulation or term of the contract. Accordingly, following *In re O'Shea* (2), Slade, J., gave judgment for the plaintiff for 1,860*l.*, holding that the money paid by the plaintiff to the defendant was not money paid "in respect of a wager" within the meaning of s. 1 of the Gaming Act, 1892.

The defendant appealed.

M. A. B. King-Hamilton for the defendant. The true purpose of this transaction was that this bookmaking company could recover betting losses from wagers rendered null and void by s. 18 of the Gaming Act, 1845. By s. 1 of the Gaming Act, 1892: "Any promise . . . to pay any person any "sum of money paid by him under or in respect of any "contract or agreement rendered null and void" by the Gaming Act, 1845, ". . . shall be null and void and no action shall be "brought or maintained to recover any such sum of money". This contract was not one of loan: it was one of money paid by the plaintiff, at the request of the defendant, to the creditor company, in respect of betting losses, i.e., on a contract rendered null and void. The cheque was merely handed to the defendant by the servant of the company that he might endorse it and hand it back to that servant. The evidence is clear, that it was never intended that the defendant should place the cheque to his own account in his own bank. The contract of July 29 and

---

(1) Gaming Act, 1892, s. 1: "Any "promise, express or implied, to pay "any person any sum of money paid "by him under or in respect of any "contract or agreement rendered null "and void" by the Gaming Act, 1845, ". . . shall be null and void, "and no action shall be brought or "maintained to recover any such sum "of money".

(2) [1911] 2 K. B. 981.

30 was partly oral and partly in writing, and the letter of July 30 was subject to the stipulation that the money advanced should be applied in payment of the bets lost. As was pleaded by the defence, there was no loan here, but a payment by the plaintiff at the request of the defendant to the company of the defendant's betting losses with the company. The moneys, therefore, claimed in this action are irrecoverable: see *Tatam* v. *Reeve* (3).

If this should be held wrong and there was a loan, it was not such a loan as that in *In re O'Shea; Ex parte Lancaster* (4), where it was open to the borrower to use the money lent as he wished though both borrower and lender expected that it would be used to pay off betting losses. There was here a binding obligation under the contract that the defendant should use the money lent in paying off his betting losses.

In Halsbury's Laws of England (2nd ed.) vol. 15, at p. 487, note p, the author, after detailing the factual position in *Tatam* v. *Reeve* (3) and *In re O'Shea* (4), continued: "When, "however, the transaction is strictly a loan and yet hampered "with a stipulation that it shall be applied in respect of a wager, "the transaction may, perhaps, stand upon a different footing" —i.e., different from that in *In re O'Shea* (4)—(cf. *Hill* v. *Fox* (5)) " . . . at any rate if the nature of the arrangement "between the lender and borrower is such that a payment made "by the latter in pursuance of it would, in effect, be a payment "made by the lender, as in *Saffery* v. *Mayer* (6)". Those are the very facts of this case. And the distinction between the facts of this case and those in *In re O'Shea* (7) are well shown in the summing up of Erle, J., on an earlier Gaming Act in *Hill* v. *Fox* (8), which was there approved by the Court of Exchequer Chamber. [He was stopped.]

Phineas Quass for the plaintiff. (i) The contract here was one of loan from the plaintiff to the defendant; (ii) there was no contractual term between the parties that the money should be applied in paying off the betting losses of the defendant with Hector MacDonald, Ld., and even if that is not so; (iii) the plaintiff is still entitled to recover this money, since the promise of the defendant to repay the loan was not made in respect of any contract rendered null and void by the Gaming Act, 1845, but was made in respect of betting debts already incurred, when the contract of loan was made.

As to the first proposition, that this was a contract of loan; the evidence is all one way. Slade, J., accepted the plaintiff as a witness of truth, and the plaintiff's evidence, unaffected by cross-examination, was that the loan from him was made at the request of the defendant, who first made the suggestion. On the second proposition, that there was no obligation that the money lent should be used in one way only, namely in discharge of the betting losses due to the company, the judge at the trial both saw and heard the plaintiff, the only witness at the trial, and his conclusion was that, though both parties expected that the money lent would be used in this way, this was not made a term of the contract and, indeed, that had not been pleaded.

---

(3) [1893] 1 Q. B. 44.
(4) [1911] 2 K. B. 981.
(5) (1859) 4 H. & N. 359.
(6) [1901] 1 K. B. 11.
(7) [1911] 2 K. B. 981.
(8) 4 H. & N. 359.

[Asquith, L.J. Was that not an inference from the facts of the case?]

There is all the difference between the purpose of the loan and the motive with which it was granted and giving effect to this purpose or actuating motive by means of a stipulation and term of the contract made.

[Asquith, L.J. The only witness in answer to the judge agreed that the money was lent to pay the company.]

[Cohen, L.J. The cheque to order crossed "and Co." and "not negotiable" was made out in favour of the defendant. Was he free to negotiate it? The plaintiff in cross-examination agreed that it was at all times the intention that the cheque should be paid to the company. And, in fact, the cheque after endorsement was handed over to the company's messenger for the purpose.]

If the defendant had not done so, it would have been a breach of honour, but not one of contract.

If I am wrong in this contention, nevertheless the plaintiff can still recover the money he has lent to the defendant. In *Ex parte Pyke; In re Lister* (9), which was heard in 1878, it was held that money lent to enable the borrower to pay a bet which had been already lost did not constitute a debt for an "illegal "consideration" within the meaning of the Act 5 & 6 Will. 4, c. 41. And the ratio decidendi in that case, as Jessel, M.R., said (10), was that the money was advanced to enable the borrower to pay the bets which he had already made and lost, which was an entirely different transaction from a loan of money to enable a man to make a bet. In *In re O'Shea* (11), Cozens-Hardy, M.R., expressed his view that the decision in *Ex parte Pyke* (9) had not been affected by the provisions of the Gaming Act, 1892. If this view, expressed in the Court of Appeal, is right, the appeal must fail: see also the observations of Fletcher Moulton, L.J., in *Hyams* v. *Stuart King* (12), in which he said that the decision in *Tatam* v. *Reeve* (13) did not apply to the case

---

(9) (1878) 8 Ch. D. 754.

(10) Ibid. 757.

(11) [1911] 2 K. B. 981, 984–5.

(12) [1908] 2 K. B. 696, 715.

(13) [1893] 1 Q. B. 44.

C. A.

1950

MacDonald
v.
Green.

where the lender had no knowledge that the money advanced was in respect of a gaming transaction.

The written contract here, when its terms were reduced into writing, was simply one of loan with the term for its repayment. The contract was not one for lending money to make a bet, but if there was a contract to use the money for paying off these bets it was one for paying bets which had already been made and lost. As such it was not a promise to pay any person a sum of money paid by him under or in respect of any contract rendered void by the Gaming Act, 1845, within the meaning of s. 1 of the Gaming Act, 1892.

King-Hamilton was not called on to reply.

Cohen, L.J. [after stating the facts]. On the authorities, if there really had been an out-and-out loan to the defendant and no obligation on him to apply the moneys lent in discharge of this particular obligation in this gaming transaction, the plaintiff would have been entitled to succeed. But, with all respect to the trial judge, I am unable to agree with him on this point. When he said that the understanding that the defendant should use this money to discharge his liability to the company was no term of the arrangement or of the contract for the loan, I do not read this as being a finding of fact, dependent in any way on the demeanour of the witness. It is rather an inference from the facts.

It is common ground, and I fully accept from the judge at the trial, that the witness was a witness of truth. It seems to me that the only possible inference from the evidence given by the plaintiff is that the oral agreement contained an express provision that the moneys received should be applied in discharge of the defendant's obligations to the company and that the plaintiff took, with the defendant's consent, every possible step to ensure that that obligation was performed. I refer not only to the two answers in reply to the questions by the judge at the end of the plaintiff's evidence, which clearly talk about a term of the agreement, but also to the evidence given in answer to Mr. King-Hamilton in cross-examination and, in particular, to the answer to the question "(Q.) It was at all times the understanding that the "cheque should be merely endorsed on the back by Mr. Green "and returned for payment into the company's account? "(A.) That was exactly his idea. He drew the whole thing up "himself". I would add that the plaintiff ensured the performance of that obligation by sending the company's servant with the cheque with instructions to await its return, as soon as it had been endorsed, and that the plaintiff then caused it to be paid into the company's account. It seems to me that, in those circumstances, the only possible inference is that it was an express term that the money should be applied in that particular way.

If the trial judge thought that to be the right view of the facts, I think he would have agreed with the conclusion which I have reached, because he states the law quite plainly, and I respectfully agree with his statement of it. He said: "There "are two lines of authority. The first is contained in *Tatam* v. "*Reeve* (14), which was approved by the Court of Appeal in "*Saffery* v. *Mayer* (15). I understand those authorities to "decide that where money is paid, at request, to discharge "losses already incurred in transactions which are null and void "within the meaning of s. 18 of the Gaming Act, 1845, directly, "by the person who provides the money, to the winner, such "money paid, at request, is money paid 'in respect of' a wager "and is, therefore, not recoverable by the person who provides "the money from the person who asks him to provide it, by "reason of the provisions of s. 1 of the Gaming Act, 1892".

Then he contrasts that with the second line of authority, which is represented by the decision of this court in *In re O'Shea; Ex parte Lancaster* (16), and the judge goes on: "I understand "that case to decide that a person who lends money to another "person who has already lost bets, for the express purpose of "enabling that person to use the money so borrowed, for the "purpose of discharging his liability to the winner in respect of "those bets, can recover because it is not money paid 'in "'respect of' a wager". If Slade, J., meant by the words, "for the express purpose", a case where there was an intention but no contractual stipulation that the borrower should use the money to discharge his betting debts, I agree with his view of what was decided in *In re O'Shea* (16).

Before I part from *In re O'Shea* (16), I ought to refer to an argument which Mr. Quass addressed to us based on this observation of Cozens-Hardy, M.R. (17): "This court in the "case of *Ex parte Pyke* (18), in the year 1878, drew a distinction to the effect that the money was not lent to the "bankrupt to enable him to make a bet, but it was lent to him "to pay for a bet which he had already made and lost, and as "the law then stood the court held that there was no objection "to that, and it took the view that the Act must be construed "strictly, and that there was nothing in the earlier Acts to hit "the transaction, which was a loan to enable the payment of a "bet that had already been made and lost. Now has that law "been altered by the Act of 1892? It is said, and the learned

(14) [1893] 1 Q. B. 44.
(15) [1901] 1 K. B. 11.
(16) [1911] 2 K. B. 981.
(17) Ibid. 984–5.
(18) 8 Ch. D. 754.

C. A.

1950

MACDONALD
v.
GREEN.

Cohen, L.J.

"registrar seems to have taken that view, that the case was "within the language or the spirit of the Queen's Bench decision "in *Tatam* v. *Reeve* (19), which was approved by the Court of "Appeal in *Saffery* v. *Mayer* (20). I am unable to accept that "view".

It is quite clear that Cozens-Hardy, M.R., is approving, within limits, *Ex parte Pyke* (21); but I do not read him as saying that, if it were a term of the loan that the money should be paid in a particular way, that would not be within the mischief of the Act; but merely as saying that, if there were a loan with the proceeds of which the borrower was entitled to deal as he liked, then it would not be within the mischief of the Act notwithstanding that it was the intention of both parties that it should be applied in a particular way. If that is what he meant, I respectfully agree. If, however, he was intending to say that it would not be within the mischief of the Act notwithstanding that there was a definite bargain to apply it in discharging the indebtedness in respect of a wagering transaction, then I think that would be in direct contravention of the Gaming Act, 1892.

The judge, after citing *In re O'Shea* (22), goes on to refer to a note in Vol. 15 of Halsbury's Laws of England (2nd ed.), at p. 487, note p., to which our attention was called by Mr. King-Hamilton. That note states: "In relation to wagers the "distinction between money lent and money paid at request "appears to be this, that in the case of a loan the money "is not paid by the lender 'under or in respect of' a wager, "the lender being unconcerned with its application; whereas "in the case of a payment by request the money is allocated "to a particular purpose and the payment is 'in respect of' "a wager. When, however, the transaction is strictly a loan "and yet hampered with a stipulation that it shall be applied "in respect of a wager, the transaction may, perhaps, stand upon "a different footing—cf. *Hill* v. *Fox* (23); at any rate, if the "nature of the arrangement between the lender and borrower "is such that a payment made by the latter in pursuance of it "would, in effect, be a payment made by the lender, as in "*Saffery* v. *Mayer* (24)".

Assuming, for the moment, this to be a loan, it seems to me that this is exactly the case contemplated by the note, namely, that there was a stipulation that it should be applied in respect of a wager. In those circumstances, although it refers to a different Act, it is, I think, worth while looking at what was said by the Court of Exchequer Chamber in *Hill* v. *Fox* (25).

(19) [1893] 1 Q. B. 44.
(20) [1901] 1 K. B. 11.
(21) 8 Ch. D. 754.
(22) [1911] 2 K. B. 981.
(23) 4 H. & N. 359.
(24) [1901] 1 K. B. 11.
(25) 4 H. & N. 359.

The headnote reads as follows: "The defendant, being "indebted to the plaintiff and other persons for money lost by "betting on a horse race, applied to the plaintiff for a loan. The "plaintiff lent the defendant 2,000*l*. upon the security of a deed, "which assigned to the plaintiff certain policies of assurance, and "contained a covenant by the defendant to pay the 2,000*l*., and "interest. On the settling day the defendant paid the plaintiff "his bets out of the 2,000*l*. In an action by the plaintiff on the "covenant, the defendant pleaded that the deed was a mortgage "security, part of the consideration for which was a gaming debt. "At the trial the judge told the jury that if the 2,000*l*. was "advanced in pursuance of a stipulation or agreement between "the plaintiff and the defendant that out of it the plaintiff should "be paid the money which he had won of the defendant by "betting, it was a mere colourable loan and evasion of the "statute; but that if there was no such stipulation or agreement, "and the plaintiff advanced the 2,000*l*. as a loan for the defendant to dispose of as he pleased, the deed was valid, although "the plaintiff expected to be paid out of the money so lent. "Held, in the Exchequer Chamber, on a bill of exceptions, that "the direction was right". That seems to me, although on a different statute, exactly the kind of direction which, I think, if this case had been tried by a jury, the judge would have given to the jury.

Mr. Quass did his best to support the judgment, and he advanced three propositions. He said, first, that the contract was one of loan; secondly, that there was no term in that contract that the money should be applied in paying the debt due to the company; and, thirdly, that, even if he were wrong on the second point, the money was still recoverable. I feel some doubt whether he is right in saying that the contract was one of loan having regard to the collateral stipulation which in my view undoubtedly existed; but I will assume in his favour that it was. On that basis I think it plain, for the reasons already given, that it was a term of the contract that the money should be applied in paying the debt due to the company. If that be so, it seems to me that, applying the principle of *Hill* v. *Fox* (25), and considering, as I do, that the direction which should have been given to the jury, if there had been one in this case, would be on the same lines as that which was given in *Hill* v. *Fox* (25), and approved by the Court of Exchequer Chamber, the money advanced by the plaintiff is irrecoverable because it is within the mischief of s. 1 of the Gaming Act, 1892.

For these reasons, I think that the appeal should be allowed.

---

(25) 4 H. & N. 359.

Asquith, L.J. I agree, and only add two or three sentences out of respect to the judge, from whom we are differing. The following principles seem to me to be deducible from the authorities. First of all, when X at the request of a loser of a bet, pays the amount of that bet directly to the winner, X cannot enforce a promise by the loser to repay him. That is decided in *Tatam* v. *Reeve* (26), and the case is directly within the mischief of the Gaming Act, 1892, s. 1, because there you have the promise by the loser to pay a person—that is X—a sum of money paid by that person, X, to the winner in respect of a bet. The second rule which emerges from the cases is that where X makes a loan to the loser so as to enable, but not so as to bind, the loser to apply the proceeds by paying the sum lost to the winner, in that case X can claim repayment. That is what was decided in *In re O'Shea* (27). The third rule is that where X makes a loan to the loser stipulating contractually that the loser shall apply it by way of paying the winner the amount of the debt and not otherwise, in that case X cannot claim repayment. That is the case of *Hill* v. *Fox* (28), from which my Lord quoted.

In my view, this case falls within the third of those three rules. It cannot be gainsaid—here I think Mr. Quass is quite right—that there was strong evidence that the transaction was one of loan; but the evidence seems to me to establish quite plainly that the understanding to apply the money lent to the payment of the debt to MacDonald, Ld. was a true term of the contract, not merely an understanding going to the purpose or to the motive for the contract. That seems to emerge in particular from the two questions which were put by the judge himself to the plaintiff at the end of his evidence, when he asked him: "You do not dispute that "you would not have lent the 4,020*l*. except upon the terms that "it should be used to discharge the defendant's indebtedness to "your company? (A.) When Jack Green put it to me the way "he did and explained it to me, you are quite correct, my Lord". Then he was asked: "The whole agreement, according to you, "was that the money should be lent, not for him to spend on a "holiday in the South of France, but to pay the company? "(A.) Definitely". I can only suppose that the judge had overlooked the replies to those question put by himself when he reached his conclusion that it was not a term of the loan that its proceeds should be applied in the way I have indicated. It seems to me quite clear that both parties would have agreed, if they had been asked, that if Mr. Green had kept this cheque instead of endorsing and returning it, the plaintiff would have been entitled to stop it.

---

(26) [1893] 1 Q. B. 44.
(27) [1911] 2 K. B. 981.
(28) 4 H. & N. 359.

Mr. Quass has relied on the absence of any such express stipulation from the so-called written contract, the letter of July 30. I do not think that the so-called written agreement of July 30, is either exhaustive of the terms of the actual bargain between the parties or that it superseded the original oral agreement made between them. This last agreement seems to me clearly to have been subject to a stipulation that the money lent should be applied in payment of the bets lost and not otherwise. For these reasons, I agree that the appeal should be allowed.

DENNING, L.J. If we were to uphold the decision of Slade, J., we should present bookmakers with a means of evading the Gaming Acts which would be as effective as was *Hyams* v. *Stuart King* (29), until it was overruled. All that a bookmaking company would have to do would be to send a messenger to the backer, with a cheque drawn by the managing director in favour of the backer and a draft letter prepared ready for signature, and get both back, the cheque endorsed and the draft letter signed.

The transaction seems to me to fall precisely within the words of s. 1 of the Gaming Act, 1892. The money for which MacDonald sues is money which his bank paid to the bookmaking company in respect of the betting debts which Green had incurred. I do not think it matters whether in point of law MacDonald's claim against Green was for money lent or for money paid at Green's request. Even if it were disguised in the form of a loan, the substance of it was that MacDonald paid Green's losses and seeks to recover the amount from Green. That he cannot do.

Mr. Quass suggested that *Ex parte Pyke* (30) was still good law, relying on a dictum of Cozens-Hardy, M.R., in *In re O'Shea* (31). I do not think that Mr. Quass interpreted the dictum aright; but in any event I am quite clear that since the Act of 1892 *Ex parte Pyke* (30) is not good law, because the lender there paid the betting debts direct.

Mr. Quass also said that *Tatam* v. *Reeve* (32), must be read with the qualification which Fletcher Moulton, L.J., put upon it in *Hyams* v. *Stuart King* (33), that there must be a knowledge on the part of the person paying that it is in respect of a betting debt. I agree, but in this case MacDonald well knew that he was paying the money in respect of betting debts.

The distinction is clear enough: a loan which leaves the borrower at liberty to apply the money as he wishes, is not invalidated by the Gaming Act, 1892, even though it is contemplated by both parties that he will probably pay betting debts

---

(29) [1908] 2 K. B. 696.

(30) 8 Ch. D. 754.

(31) [1911] 2 K. B. 981.

(32) [1893] 1 Q. B. 44.

(33) [1908] 2 K. B. 696, 715.

C. A.
1950

MACDONALD
v.
GREEN.

Denning, L.J.

with it; but when a loan is hampered by a stipulation that the money *is* to be used for payment of a betting debt, then no matter whether the stipulation is express or implied or to be inferred from the circumstances, the loan is a payment in respect of the betting debt and is hit by the Act. In this case there was a stipulation, to be inferred from the circumstances, that the money was to be applied solely in payment of the betting debt. The statute therefore prevents its recovery. I agree with my Lords that the appeal must be allowed.

Appeal allowed.

Solicitors: *King-Hamilton & Co.; Ronald M. Simons.*

C. G. M.

C. A.
1950
Dec. 14.

Evershed, M.R., Singleton, L.J., and Vaisey, J.

BODDINGTON *v.* WISSON.

[Plaint No. 113]

Landlord and Tenant—Agricultural Holding—Notice to quit given before March 1, 1948*—Consent of Minister not obtained—Order requiring consent of Minister revoked before expiration of notice—Validity of Notice—"Null and Void"—Meaning—Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63), *s.* 38, *sub-s.* 2*—Defence* (*General*) *Regulations*, 1939 (*St. R. & O.* 1941, *Nos.* 1774 *and* 2052, 1943, *No.* 200), *reg.* 62, *para.* 4A, *reg.* 99B*—Defence Regulations* (*No.* 3), 1948 (*S.I.* 1948, *No.* 336).

Reg. 62 (4A) of the Defence (General) Regulations, 1939, provided: That where an agricultural holding had been sold under a contract for sale made since September 3, 1939, any notice to quit given to the tenant expiring after the end of 1941 "shall be "null and void. Provided that this paragraph shall not apply "to any notice if (whether before or after the giving thereof) the "Minister of Agriculture and Fisheries consents in writing there-"to". Reg. 99B provides: "The Interpretation Act, 1889, shall "apply to the interpretation of any Order in Council, order, rule "or by-law made under or by virtue of the Emergency Powers "(Defence) Act, 1939, the Supplies and Services (Transitional "Powers) Act, 1945, or the Emergency Laws (Transitional Pro-"visions) Act, 1946, as it applies to the interpretation of an Act "of Parliament, and for the purposes of s. 38 of the Interpreta-"tion Act, 1889, any such Order in Council, order, rule, or by-"law as aforesaid shall be deemed to be an Act of Parliament". The Defence Regulations (No. 3), 1948, which came into operation on March 1, 1948, provided: "Paragraph (4A) . . . of Reg. 62 of "the Defence (General) Regulations, 1939 (which relate to the "termination of tenancies of agricultural holdings . . .) are hereby "revoked . . .".

Before March 1, 1948, a landlord gave to the tenant of an agricultural holding within reg. 62 (4A) notice to quit expiring on October 11, 1948. The landlord did not apply for or obtain the consent of the Minister under the regulation. He claimed possession of the holding. The tenant contended that, since the consent of the Minister had not been obtained in accordance with Reg. 62 (4A), the notice was null and void.

Held, (1.) that "null and void" in reg. 62 (4A) had a limited significance, meaning no more than that the notice was not enforceable against the tenant, unless the condition of ministerial consent had before its expiry been obtained; that the effect of the revocation of reg. 62 (4A) by the Regulations of 1948 was that reg. 62 (4A) must be treated quoad this notice as if it had never existed; and that, the regulation which imposed the condition of obtaining ministerial consent having gone, the notice no longer suffered from its initial disability.

(2.) That the wording of s. 38, sub-s. 2, of the Interpretation Act, 1889, was not appropriate to preserve the procedure of reg. 62 (4A), and accordingly the notice to quit was of full force and effect.

Kestell v. *Langmaid* [1950] 1 K. B. 233, considered.

APPEAL from Judge Lawson Campbell sitting at Biggleswade county court.

The plaintiff, John Boddington, had let an agricultural holding to the defendant, Stanley Wisson, on a yearly tenancy determinable by a year's notice to quit expiring on October 11 in any year. The landlord served notice to quit on the tenant before March 1, 1948, expiring on October 11, 1948. At the time of the service of the notice reg. 62 (4A) of the Defence (General) Regulations, 1939 (1) was in force and applied to the tenancy. The landlord, however, did not apply to the Minister of Agriculture and Fisheries in accordance with the provisions of that regulation for his consent to the service of the notice to quit.

---

(1) Defence (General) Regulations, 1939, reg. 62, para. 4A: "Where the "whole or any part of an agricultural holding is subject to a contract "of sale made since September 3, "1939, or has been sold in pursuance "of a contract of sale made since that "date, any notice to quit that holding or any part thereof given "to the tenant so as to expire at "any time after the end of the "year 1941 shall be null and void: "Provided that this paragraph shall "not apply to any notice if (whether "before or after the giving thereof) "the Minister of Agriculture and "Fisheries consents in writing "thereto".

Reg. 99B: "The Interpretation "Act, 1889, shall apply to the interpretation of any Order in Council, "order, rule or by-law made under "or by virtue of the Emergency "Powers (Defence) Act, 1939, the "Supplies and Services (Transitional "Powers) Act, 1945, or the Emergency Laws (Transitional Provisions) Act, 1946, as it applies to "the interpretation of an Act of "Parliament, and for the purposes of "s. 38 of the Interpretation Act, "1889, any such Order in Council, "order, rule, or by-law as aforesaid "shall be deemed to be an Act of "Parliament".

C. A.
1950

BODDINGTON
v.
WISSON.

On March 1, 1948, Defence Regulations (No. 3), 1948 (2) came into operation, which revoked reg. 62 (4A) of the Regulations of 1939. The tenant having failed to deliver up possession in compliance with the notice to quit, the landlord in these proceedings claimed possession. The county court judge made an order for possession, and the tenant now appealed.

Gordon Hardy for the tenant. It is submitted, first, that the notice to quit which was served by the landlord on the tenant was unenforceable, since the landlord failed to obtain the consent of the Minister in accordance with reg. 62 (4A) of the Defence (General) Regulations, 1939. Reg. 62 (4A) was revoked by the Defence Regulations (No. 3), 1948, on March 1, 1948, but that revocation did not make the notice to quit good. Immediately before March 1, 1939, the notice to quit was " null and void " by virtue of reg. 62 (4A). Regulation 99B of the Defence (General) Regulations, 1939, provides that s. 38 of the Interpretation Act, 1889 (3), shall apply to the interpretation of the regulations of 1939 as it applies to an Act of Parliament. Paragraph (*a*) of sub-s. 2 of s. 38 provides that repeal shall not " revive anything " not in force or existing at the time at which the repeal takes " effect ". It is submitted that this notice to quit being " null " and void " was " not in force " when reg. 62 (4A) was revoked. Accordingly, the notice was a bad one, and the landlord should have served a further notice to quit. [He referred to *Hamilton Gell* v. *White* (4); *Lewis* v. *Hughes* (5).] *Kestell* v. *Lang-*

---

(2) Defence Regulations (No. 3), 1948: " Paras. (2), (4A) and (4B) of " Reg. 62 of the Defence (General) " Regulations, 1939 (which relate to " the termination of tenancies of agri- " cultural holdings which are not " being properly cultivated and make " other provisions with respect to the " termination of agricultural tenan- " cies) are hereby revoked, except in " their application to Scotland and " Nothern Ireland ".

(3) Interpretation Act, 1889, s. 38, sub-s. 2: " Where this Act or any " Act passed after the commencement " of this Act repeals any other enact- " ment, then, unless the contrary " intention appears, the repeal shall " not—

" (*a*) revive anything not in force " or existing at the time at which the " repeal takes effect; or,

" (*b*) affect the previous operation " of any enactment so repealed or " anything duly done or suffered " under any enactment so repealed; " or

" (*c*) affect any right, privilege, " obligation, or liability acquired, " accrued, or incurred under any " enactment so repealed; or

" (*d*) affect any penalty, forfeiture, " or punishment incurred in respect " of any offence committed against " any enactment so repealed; or

" (*e*) affect any investigation, legal " proceeding, or remedy in respect of " any such right, privilege, obliga- " tion, liability, penalty, forfeiture, or " punishment as aforesaid;

" and any such investigation, legal " proceeding, or remedy may be " instituted, continued, or enforced, " and any such penalty, forfeiture, or " punishment may be imposed, as if " the repealing Act had not been " passed ".

(4) [1922] 2 K. B. 422.

(5) [1916] 1 K. B. 831.

maid (6) shows that a notice to quit to which the Minister has not assented is bad. In *Edwards* v. *Hall* (7) it was not suggested that the repeal of reg. 62 (4A) had the effect for which the landlord contends here. Alternatively, if this case does not fall within para. (*a*) of sub-s. 2 of s. 38, it falls within para. (*c*), and, notwithstanding the revocation of the regulations, the landlord was still liable to obtain the Minister's consent after the revocation. The revocation of the regulation cannot turn a notice which was " null and void " into a good notice. It would be against the general policy of Parliament to construe the revocation of this regulation as defeating the protection which Parliament intended to give tenants.

T. H. K. Berry for the landlord. It is not conceded that the notice to quit which the landlord served was a bad one before March 1, 1948, when reg. 62 (4A) was revoked, because at any time up to the expiry of the notice the consent of the Minister could have made it effective. Until that consent was given it was a defeasible or conditional notice. The only effect of the revocation of reg. 62 (4A) was to remove a fetter on enforcing the notice. " Null and void " in the regulation does not mean that the notice was wholly inoperative. The landlord or the tenant could have applied for the Minister's consent. To say that such a notice to quit was not in force is wrong. Regulation 62 (4A) was a fetter on the landlord's common-law rights. When there is any doubt as to the construction of regulations imposing a limitation on such rights, the court should lean in favour of limiting the rights as little as possible.

EVERSHED, M.R. [after stating the facts]: The county court judge gave a careful judgment in favour of the landlord. He made an important reference in the early part of his judgment to the interpretation which this court has placed on the formula " null and void "; and he concluded judgment by saying: " It is perfectly obvious that the regulation made in 1948 was " being framed to do away with the whole of the procedure laid " down by reg. 62 (4A), and it would be an odd thing to say " that where it is doing away with the whole thing, it does not " apply to any case where notice has been given already. I " cannot believe that it means that. I say it is revoked entirely " so that the regulation ceases to have any effect. . . . This is " supported by the fact that the law was then in a state of " transition. One stage in moving from the old code to a new " one. For these reasons I feel that the moment reg. 62 became " inoperative, all consents became unnecessary ". With that conclusion of the judge I agree. Since the matter is of some

---

(6) [1950] 1 K. B. 233.

(7) [1949] 1 All E. R. 352.

C. A.

1950

BODDINGTON v. WISSON.

Evershed, M.R.

importance and has been carefully argued, I will state the steps by which I arrive at that conclusion.

It is first necessary to see what the phrase "null and void" means. When para. (4A) of Defence Reg. 62 originally saw the light of day, the proviso was in a different form, being to the effect that a notice to quit would be null and void unless prior to the giving of it the Minister's consent had been obtained. If that had been its form throughout, I think that the words "null "and void" would have been appropriate. But the change in the form of the proviso—the use of words which show quite plainly, as the court has since held, that ministerial consent may be given at any time up to the expiry of the notice—makes the words "null and void" obviously inappropriate, at least without substantial reservations. As Mr. Berry pointed out, a notice to quit which expires in a year's time cannot be said to be effective, in one sense of the word, until the date arrives on which it is, by its terms, to take effect. If, notwithstanding the first part of the regulation, a notice can always be made fully effective by a consent given at any time up to the expiry of the notice, it seems quite inappropriate, pending the giving of the consent, to treat the words "null and void" as meaning wholly nugatory and without any force and effect in any circumstances.

Indeed, in *Kestell* v. *Langmaid* (8) expression was clearly given to that view by this court. There a notice had been given, and the Minister's consent was never in fact asked for and was never obtained. The tenant, nevertheless, went out of possession when the notice expired and then sought compensation under the Agricultural Holdings Act, 1923, on the ground that the tenancy of his holding had terminated "by reason of a notice "to quit" given by the landlord and in consequence of such notice. The landlord argued, fastening upon the etymology of "null and void", that no tenant could be said to have quitted a holding by reason or in consequence of something which was null and void. But this court pointed out that "null and void" had no such destructive signification, and that, in the circumstances, it really comes to no more than that the notice is not enforceable by the landlord against the tenant unless the condition of ministerial consent has, before its expiry, been obtained. *Kestell* v. *Langmaid* (8) is important as showing that, even where no consent has been given, if the tenant acts upon the notice, then, for the purposes of attracting compensation, it retains the quality that it would have at common law of being a valid and effective notice to quit.

I come now to the regulation of 1948 which revoked reg. 62 (4A). It is well established that, apart from the Interpretation

(8) [1950] 1 K. B. 233.

Act, 1889 (which took the place of an earlier Act of 1850), the effect of a repeal of an Act of Parliament is that the Act repealed is treated as having been ab initio non-existent. The matter is stated thus in Maxwell on The Interpretation of Statutes (9th ed.), p. 404: "Where an Act . . . was repealed, "it was formerly regarded"—that is, before the Interpretation Act, 1889—"in the absence of provision to the contrary, as "having never existed, except as to matters and transactions "past and closed". Apart, therefore, from the application of the Interpretation Act, 1889, if it does apply, the effect of the revocation of reg. 62 (4A) would, as I understand it, be that the regulation would, quoad this notice, be treated as though it had never existed. In other words, the only thing which qualified or in any way disabled the effect that notice would have at common law has been swept away and removed. I think that that would be so, even though the words "null and void" were to have their full signification. Since "null and void" has a much more limited meaning, it becomes still more difficult to say that after a regulation which imposed a condition had gone, the notice would still suffer from its initial disabling characteristic.

But that is not the end of the matter, because it is also provided by reg. 99B of the Defence (General) Regulations, 1939, that the Interpretation Act, 1889, should apply to regulations of this kind, as it applies to statutes. [His Lordship read reg. 99B.] By s. 38, sub-s. 2, of the Interpretation Act, 1889: "Where this "Act or any Act"—and it is necessary now to include statutory instruments—"passed after the commencement of this Act "repeals"—and I take that to be the same for this purpose as revokes—"any other enactment, then, unless the contrary "intention appears, the repeal shall not"—and then five paragraphs follow, the first being "(*a*) revive anything not in force "or existing at the time at which the repeal takes effect".

If reg. 62 (4A) had taken its original form, so that the notice in question would have been wholly inoperative or null and void by virtue of that regulation from the moment of its service because of the non-fulfilment of a condition precedent, then I think that the effect of sub-s. 2 (*a*) would have been that the common-law rule to which I have already alluded would not have applied to give life again to this notice to quit, which the earlier regulation had said should be wholly without effect. But, as I have pointed out, the effect of reg. 62 (4A) was not so destructive. I think that there is great force in the argument of Mr. Berry that this notice to quit is not within the words of s. 38, sub-s. 2 (*a*), at all. It cannot be said of this notice to quit, even before reg 62 (4A) was revoked, that it was not "in "force": for some purposes it was. It was only conditionally

C. A.
1950

BODDINGTON
v.
WISSON.

Evershed, M.R.

enforceable, but it was in force in the sense that it could have been acted on at any rate by the tenant. Equally it could not be said that that notice to quit was not existing. So long as it was not wholly null and void, for some purposes at any rate it must have existed. And I think that there is a still further difficulty. As I have stated, reg. 62 (4A) gives to the Minister a power and a duty to give his consent in appropriate cases, and such consent takes away the disqualification to which, without it, the notice might by virtue of the regulation be subject.

Whatever might be said as to the effect of para. (*a*) in reviving something which was ineffective, it seems very difficult to say that the paragraph was effective to keep alive a ministerial or executive function of the Minister to give consents to notices and thereby to make them enforceable where they otherwise would not be.

Paragraph (*b*) of s. 38, sub-s. 2, provides that the repeal is not to affect anything duly done under another statute. I do not think that that paragraph can assist the tenant. Nor do I think that the tenant's protection under the regulation could be fairly described as a "right" or "privilege", or the limitation of the landlord's right to be fairly described as an "obligation" or "liability" within para. (*c*). Nor do I think that it is a "penalty" or a "punishment" in respect of an offence within para. (*d*). Mr. Hardy put forward an argument of some ingenuity on para. (*e*), which provides that the repealing Act is not to affect any "investigation", among other things, "in "respect of any such right, privilege, obligation, liability"—etc. —"as aforesaid". If there is here no "right" or "privilege", and in my view there is not, then it cannot be covered by "investigation", because the only investigations referred to are in respect of such rights as are previously mentioned. The argument has failed to satisfy me that the investigation which reg. 62 (4A) supposes that the Minister will, if he performs his ministerial duties aright, undertake before giving his consent, is an "investigation" as envisaged by para. (*e*). Nor do I think that the landlord's right to ask for consent could be described as a "right" within para. (*c*) or as a right to require an investigation within para. (*e*).

I therefore take the view, which the judge below took, that the words of sub-s. 2 of s. 38 are not appropriate to preserve the procedure and results of reg. 62 (4A) quoad this particular notice. I would be disposed to agree with Mr. Hardy that the result is perhaps one which Parliament, if asked, would have said that it did not contemplate. We, however, must interpret the language which Parliament has thought fit to use or which it has thought fit to delegate to a minister to use. I think that this may well be a casus omissus; but, looking at the language of this statutory instrument, or of the two statutory instruments together, I cannot for myself see any such ambiguity as would entitle us, by investigating the policy of the Agricultural Acts, to import into the second regulation words which would keep alive, for the purposes of this notice, and other notices like it, the full effect of the revoked regulation.

In modern times it has been found convenient, and I do not doubt that it is most useful, to give to ministers the power, subject to Parliamentary supervision, to legislate by regulation, as it is sometimes called. It is not for this court to question the wisdom of what Parliament has quite plainly authorized ministers to do. It is one result of that policy that instruments of this kind, which affect the rights of many citizens, may not have the advantage of consideration in Parliamentary debate upon their terms; and therefore there may be cases (and this may be one) in which there is a lacuna in the provisions of the instruments. But it is not, I conceive, the function of this court in these cases to do the work of Parliament and indulge in what is referred to as "judicial legislation". It was, I think, Cardozo, C.J., who said that in modern times, when the legislative body is more or less in continuous session and therefore able quickly to remedy any defects in its enactments, there is less room for such judicial legislation than in the past. In the case of statutory instruments that is certainly more rather than less true, for the means of remedying a defect in a statutory instrument is always to hand. I should not like it to be thought that I was criticizing the draftsman of these regulations. We are fortunate in that the drafting is carefully and most skilfully done; but that there may be sometimes a casus omissus is not surprising.

I am comforted in making these observations by one circumstance. After May, 1948, *In re Kendrick's Agreement* (9) showed quite clearly what was the true meaning of the proviso to reg. 62 (4A). It may be that until that decision it had not been fully appreciated that the language used, whether intentionally or not, had the effect that the ministerial consent could be given at any time up to the expiry of the notice. After that decision, the Ministry concerned proceeded to deal with the excepted cases in Defence Regulations (No. 3), 1948, that is to say, they proceeded to deal with Scotland, and S.I. No. 2343 of November 1, 1948, took this form: "Paragraph . . . (4A) . . . of reg. 62 "of the Defence (General) Regulations . . .", is revoked, following exactly the language of the earlier revoking instrument. Then there was this proviso: "Provided that, notwithstanding

---

(9) [1948] Ch. 430.

C. A.
1950
Boddington
v.
Wisson.
Evershed, M.R.

"the foregoing revocation and without prejudice to the provisions "of s. 38 of the Interpretation Act, 1889, the provisions of para. "(4A) aforesaid shall apply to any such notice to quit referred "to in the said paragraph as has been given to a tenant prior "to the date of coming into operation of this Order". That proviso supports the view which I have formed, that, having regard to the true construction of reg. 62 (4A), without a proper saving clause, it was not sufficient to rely upon the Interpretation Act, 1889, to keep alive for all purposes quoad notices then current the revoked para. (4A) of reg. 62. Whether that was so or not, is a mere matter of speculation, but I confess that I have derived some comfort from the change in language, because I think it does indicate or lend support to the view that, as the Defence Regulations (No. 3), 1948, stand, there is nothing, whether by invocation of the Interpretation Act, 1889, or otherwise, to keep alive the provisions of para. (4A) of reg. 62 so far as concerns this notice.

For these reasons I think that this appeal fails.

Singleton, L.J. I agree.

Vaisey, J. I also agree.

Appeal dismissed.

Solicitors: *Iliffe, Sweet & Co. for Wilkinson & Butler, St. Neots; Alexander Farr & Son, Bedford.*

B. A. B.

C. A
1950
Dec. 12.
13, 20.
Somervell and Jenkins, L.JJ., and Hodson. J.

HOWKINS *v.* JARDINE.

[Plaint F. 62]

Landlord and Tenant—Agricultural holding—Lease of three cottages with agricultural land—Tenancy from year to year with provision for six months' notice to quit—Cottages sub-let to persons not engaged in agriculture—Twelve months' notice to quit cottages and land served by landlord under Agricultural Holdings Act—Notice held inoperative by Agricultural Land Tribunal—Whether notice invalidated in respect of cottages—Severance of agricultural land from non-agricultural land not effected by Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 1, *sub-s.* 1.

In 1935 a landlord granted to a tenant a tenancy from year to year, terminable by six months' notice to quit, of seven acres of land and three cottages on the land. The lease contained provisions usual in a lease of an agricultural holding. The tenant, who farmed other land in addition to the seven acres, sub-let the three cottages to persons who were not engaged in agriculture. After the death of the landlord his executors served on the tenant twelve months' notice to quit the cottages and land under s. 23, sub-s. 1 of the Agricultural Holdings Act, 1948. The tenant thereupon served a counter notice under s. 24, sub-s. 1 of the Act. The Minister of Agriculture having given his assent to the notice to quit, the tenant appealed to the Agricultural Land Tribunal, who allowed his appeal, holding that the notice to quit was inoperative. Proceedings were then brought in the county court by the executors as landlords, and they were granted by the county court judge a declaration that they were entitled to possession of the cottages and to mesne profits on the ground that the decision of the tribunal rendered the notice to quit invalid so far as it related to the land as distinct from the cottages. On appeal by the tenant:—

Held, (1) that s. 1 of the Act of 1948, which defined "agricultural holding" as meaning "the aggregate of the agricultural "land comprised in a contract of tenancy" did not effect a severance of agricultural land and non-agricultural land, and as the lease in question was in substance a lease of an agricultural holding, therefore, the whole of the subject-matter of the contract of tenancy came within the protection of the Act, and the appeal must be allowed; (2) that the character of the demised premises as agricultural or non-agricultural land could not depend on the occupation of the persons to whom the cottages might be let from time to time.

Per Jenkins, L.J.: Even if s. 1, read in conjunction with s. 94, were given the meaning contended for by the landlords, their case should not succeed because the Act contained no such provisions for severance as would be required to enable a notice to quit in respect of a mixed tenancy to be given a separate and effective operation in regard to the non-agricultural part of the demised premises where it was rendered ineffective as regards the agricultural part by reason of the withholding of the requisite consent.

APPEAL from Judge Tucker, sitting at Uttoxeter county court.

In April, 1935, one Reginald Howkins let to the defendant, John Macdonald Jardine, Pear Tree Farm, situated at Stubwood, Staffordshire, consisting of seven acres of land, together with three cottages on the land, at a rent of 52*l*. a year. The tenancy was from year to year, with a provision for six months' notice to quit. At that time the tenant lived in one of the cottages, but he subsequently removed to another farm which he had acquired in the neighbourhood, and he sub-let the cottages to persons not engaged in agriculture. The lease contained provisions usually to be found in leases of agricultural holdings. On March 23, 1949, after the death of the original landlord, the plaintiffs, his executors, served on the tenant a twelve months' notice to quit in accordance with s. 23, sub-s. 1, of the Agricultural Holdings Act, 1948. The tenant thereupon served on the landlords a counter-notice under s. 24, sub-s. 1, of the Act. The consent of the Minister of Agriculture having been given to the landlords' notice to quit, the tenant appealed to the Agricultural Land Tribunal, who held that the notice to quit was inoperative.

The landlords thereupon started proceedings in Uttoxeter county court, claiming possession of the three cottages and rents and profits.

The county court judge allowed the claim. He held that the withholding of consent by the Agricultural Land Tribunal only made the notice to quit ineffective in respect of the agricultural land and did not prevent it from achieving a valid termination of the tenancy so far as the cottages were concerned. While admitting that the Agricultural Holdings Act contained no express provision for the severance of a mixed tenancy into two tenancies, he was of opinion that such a consequence resulted as a matter of necessary implication from the terms of s. 1 of the Act (1), and that any necessary apportionment of rent could be effected by arbitration under s. 8. The tenant appealed.

Heathcote-Williams, K.C., and *A. K. Kisch* for the tenant. The lease was clearly a lease of an agricultural holding and the landlords from the beginning always treated it as such. The notice to quit was a twelve months' notice, as required for an agricultural holding under the Act of 1948; and it was a notice to terminate the whole agreement and not merely in respect of the three cottages. In fact all the early proceedings were taken under the Agricultural Holdings Act. The Agricultural Land Tribunal having decided that the notice to quit the whole holding was inoperative, the landlords have started entirely new proceedings in the county court for possession of the cottages, their contention being that the tenant's counter-notice related only to the agricultural land and not to the cottages, which were occupied by non-agricultural sub-tenants. Alternatively, they contend that the refusal of the Land Tribunal to assent to the notice to quit related only to the agricultural land and not to the cottages. The notice to quit was served in respect of the whole holding, and the decision of the tribunal must have had reference to the cottages as well as the land. A notice to quit cannot operate as to part only of a tenancy agreement unless there is express provision to that effect in the agreement itself. The statute contains no such provision. Section 31 [Notices to quit parts of holdings not to be invalid in certain cases] cannot apply to the present case, and s. 33 [reduction of rent where notice is given to quit part of holding] only applies where the notice to quit part is not invalid, being served in connexion with the objects stated in s. 31 or in pursuance of a provision in the contract of tenancy. Section 1, which defines "agricultural "holding", refers to the whole of the contract of tenancy, and cannot be construed so as to effect a severance of the agricultural from the non-agricultural land. If s. 1 had been intended to effect severance, provisions for severance would have been found in other sections of the Act, and there are none. The tribunal having given their decision, the matter was res judicata and the landlords could not properly apply to the county court to upset that decision. They were only entitled to proceed by certiorari: see *In re Russell and Harding's Arbitration* (2).

---

(1) Agricultural Holdings Act, 1948, s. 1, sub-s. 1: "In this Act "the expression 'agricultural hold- "'ing' means the aggregate of the "agricultural land comprised in a "contract of tenancy, not being a "contract under which the said land "is let to the tenant during his "continuance in any office, appoint- "ment or employment held under the "landlord".

Sub-s. 2: "For the purposes of this "and the next following section, the "expression 'agricultural land' "means land used for agriculture "which is so used for the purposes of "a trade or business and includes "any other land which, by virtue of "a designation of the Minister of "Agriculture and Fisheries . . . under "sub-s. 1 of s. 109 of the Agriculture "Act, 1947, is agricultural land "within the meaning of that Act".

P. A. Ferns for the landlords. The point of law that the matter is res judicata was not taken in the court below and cannot now be raised before this court. The appeal involves two main points: (1.) what is the effect of s. 1 of the Act of 1948 on a letting which includes both agricultural land and non-agricultural land?; (2.) what is the effect of a notice to quit a holding where part of the premises are non-agricultural? Under the Agricultural Holdings Act, 1923, it was necessary to see what was the dominant user of the whole of the holding. The Act of 1948 introduced an entirely new definition of "agricultural holding", and defined it as "the aggregate of the agricultural land comprised "in a contract of tenancy". It is therefore necessary to split up or define what portions are used entirely for agriculture, and any portion not so used is outside the Act. The landlords rely on the use to which these cottages are being put. Section 1 contemplates that land may be agricultural and non-agricultural, and it is necessary to aggregate in order to ascertain what is agricultural and what is not. Accepting that severance is intended under s. 1, there was no necessity to put further sections in respect of severance into the Act. If non-agricultural land is found by this court to be within the Act of 1948, it will be conferring on the Minister of Agriculture arbitrary powers over non-agricultural land. If it be held that s. 1 authorizes severance, then s. 24, sub-s. 1 [tenant's counter-notice] cannot apply to the non-agricultural portion of the holding, which is not covered by the Act. The purpose of the Act is to protect the farmer on his farm and not in his investments.

---

(2) (1922) 128 L. T. 476.

[*In re Lancaster and Macnamara* (3) and *Gee* v. *Hazleton* (4) referred to.]

Cur. adv. vult.

December 20. The following judgments were read:—

SOMERVELL, L.J., stated the facts and continued:—The position is on the face of it remarkable. The tenancy agreement remains in existence, the three cottages being taken out of it, the rent and other terms, so far as the county court judge's decision is concerned, remaining unaltered. The argument turns on s. 1 of the Agricultural Holdings Act, 1948. [His Lordship read sub-ss. 1 and 2 of the section and continued.] Mr. Ferns, for the landlord, submits that these words take out of the scope of the Act any parcel, however small, which is not at some relevant date being used for an agricultural purpose. It follows, I think, that the words must bring in as an agricultural holding any parcel of the whole of what is demised, used for agriculture, even though the lease was plainly not in the ordinary sense an agricultural lease, for example, a large hotel with three or four acres of pasture. On this view the parcels within the land let which constitute the agricultural holding will fluctuate: a cottage, when occupied by a postman, is outside the Act; if he leaves and it is occupied by an agricultural worker, it comes within the Act.

There seems to me to be two issues: does the definition provide for severance in any case; or has one to find that the tenancy is in substance one of agricultural land? Does the presence of a shop in a row of cottages in the lease of a 100-acre farm take that cottage with its shop out of the provisions of the Act, leaving the remainder of what is demised within? Secondly, if it severs does it sever on the basis of user of isolated plots or cottages which happen at the moment not to be used for agricultural purposes—cottages occupied, as here, by non-agricultural workers, or, say, a pasture field part of a large farm used for a time as a playing field, and not pastured? Or, if it severs, does it only do so in the case of something which is clearly severable by its nature, to take an example from a case to which I will refer, an inn let with a farm but carried on wholly independently of the farm?

Construing the words in the context of the Act, I have come to the conclusion, for reasons which I will elaborate later, that the definition does not effect a severance, and that for the Act

(3) [1918] 2 K. B. 472.

(4) [1932] 1 K. B. 179.

to apply the tenancy as a whole must be in substance a tenancy of agricultural land. There is some authority, and an argument based on previous Acts dealing with the same subject-matter, supporting the view that this is wrong and that the definition does at any rate in certain cases effect a severance. On this basis I am, however, clear that it only does so in cases where what is non-agricultural is severable by its nature as, for example, an inn or factory independent of the farm and farmlands. I will return to this point later.

For the wider proposition Mr. Ferns relied on the words in s. 1, sub-s. 2, "used for agriculture". In my view this subsection is not directed to severance, but to taking out of the Act land which is used for the purposes of agriculture within the definition in s. 94, but not as a trade or business. If severance is to be found it must be found in s. 1, sub-s. 1.

Before coming to the main argument I will mention one point which can be disposed of shortly. Mr. Kisch submitted that the county court judge had no jurisdiction, the matter of the whole holding having been submitted to and decided by the Land Tribunal. This would be in effect a plea of res judicata. Mr. Ferns submitted that this point had not been taken below and could not be taken here. We were satisfied that it had not been taken below. There was no evidence before us as to the course of argument before the Land Tribunal. If the point had been taken, such evidence might well have been relevant. We therefore decided that the point could not be taken in this court.

Mr. Ferns' argument, in so far as it is based on history, is as follows: In *In re Lancaster and Macnamara* (5) a farm and an inn were let under one tenancy at one entire rent. The business of the inn was entirely separate from the farm. On the expiry of the lease the tenant claimed compensation in respect of improvements to the farm. The court held that this could not be done as the subject of the letting was not a holding within the definition. The relevant words were "holding . . . means "any parcel of land held by a tenant which is either wholly "agricultural or wholly pastoral, or in part agricultural and as "to the residue pastoral". The inn, which was of considerable size, was clearly not within these words. It was argued, as here, that the words allowed a severance, so that the farm would be within the Act and the inn outside it. The argument to my mind was certainly as forcible on that definition as on the present one. Swinfen Eady, M.R., considered the machinery and other provisions of the Act and rejected the argument as quite impossible.

The position was regarded as anomalous and was met by s. 33

(5) [1918] 2 K. B. 472.

of the Agricultural Holdings Act of 1923, which provides as follows: "(1.) Where the land comprised in a contract of "tenancy is not a holding within the meaning of this Act by "reason only of the fact that the land so comprised includes "land (hereinafter referred to as 'the non-statutory land') "which, owing to the nature of the buildings thereon or the use "to which it is put, would not, if it had been separately let, be "a holding within the meaning of this Act, the provisions of this "Act relating to compensation for improvements and disturbance "shall, unless otherwise agreed in writing, apply to the part of "the land exclusive of the non-statutory land as if that part "were a separate holding. (2.) This section shall not apply in "relation to a contract of tenancy made before the first day of "January, 1921".

We were told there was no similar section in the Act of 1948. Parliament cannot have intended, Mr. Ferns submitted, to revive the *Lancaster and Macnamara* (5) anomaly. Therefore it must have presumed that the definition solved it by severance. I do not think there is great force in that argument. The present Act, unlike that of 1923, gives the power applied in the present case to extend tenancies. There would be no ground for affording this protection to an inn. There would therefore have to be machinery, which, as I shall endeavour to show, is lacking, for apportionment of rent. There seems, I agree, no reason why in a combined lease the tenant should not be able to claim for improvements to a farm. Section 33 may, however, have created anomalies as well as solved one. It may be that it was thought more simple to proceed on the basis that those who want the benefits conferred by the Act must see that they get leases which are in substance agricultural leases, and do not cover other subject-matter.

The authority relied on by the county court judge, and by Mr. Ferns before us, is *Dunn* v. *Fidoe* (6). In that case twelve acres of pasture and orchard were let with an inn. The tenant had made substantial profits from the land mainly by the sale of fruit. The inn, though not a farm house, had been adapted for use with the land. Tucker, L.J., read the county court judge's findings as meaning that those premises, i.e., the inn, in which the tenant lived, were a necessary part of the land. The land was of small value compared to the inn. The landlord served a notice to quit. The tenant invoked the procedure of s. 24. The Minister did not give his consent. The landlord sought an order for possession in the county court. The county court judge held that the land and the inn together constituted an agricultural holding, and that, therefore, no order could be made as the Minister's consent had been refused.

---

(5) [1918] 2 K. B. 472.

(6) [1950] W. N. 419; 66 T. L. R. (Pt. 2) 611.

It is to be noted that the landlord was not, as here, seeking to sever and claim the inn only. The actual issue of severance and its consequences was not before the court. Tucker, L.J., did, however, base his decision on the view that the definition in s. 1, sub-s. 1, clearly contemplated a tenancy which comprised in part agricultural and in part non-agricultural land, the agricultural part being an agricultural holding within the Act. Counsel for the landlord had argued that the test was the dominant or main user. Tucker, L.J., accepted this formula as the test under the earlier definition which I have cited. He regarded it as no longer the test, because the new definition provides for severance in cases where the dominant user might be said to be non-agricultural if, of course, there was agricultural land. That test, therefore, being out of the way, he had no difficulty in coming to the conclusion, on the finding which I have cited, that the whole was an agricultural holding.

In a short judgment Asquith, L.J., agreed that the appeal failed, and added: "The findings of fact of the county court "judge make it unnecessary to decide some of the interesting "and critical questions of law around which the argument "revolved". I would conclude from this that he did not think it necessary to rely on the construction put by Tucker, L.J., on the definition. In any event, in the latter part of his judgment Tucker, L.J., expressly leaves open the question whether a notice to quit could be held inoperative under the Act in respect of the agricultural portion only in a case where the tenancy covered also a building "totally unconnected" with the agricultural land. I therefore do not think that that decision is to be treated as one binding on this court in respect of the argument put forward by the landlord here.

If, then, I am free to consider the matter, I have come to the conclusion that an examination of the Act as a whole shows that the definition should not be construed as effecting a severance of a tenancy. In the first place I think that the words do not compel such a conclusion. The words "comprised in a contract "of tenancy" are, I think, apt to cover the whole of what is demised, though in certain contexts they might indicate any part. The word "aggregate", I think, has reference to the definition of agricultural to be found in the definition of agriculture in s. 94, where all the various activities to be included are set out. As I have already said, I think that the words used, if anything, indicate severance less than the earlier definition where that argument was negatived having regard to other provisions of the Act.

I will therefore consider the present Act. If severance had

C. A.
1950

HOWKINS
v.
JARDINE.

Somervell, L.J.

been intended, the first thing one would expect to find is machinery for apportionment of rent in cases where the tenant gets protection for part only of the subject-matter of the tenancy. Mr. Ferns submitted that this was to be found in s. 8, which provides for "arbitration on terms of tenancies as to rent". Section 8, sub-s. 1, is obviously necessary, having regard to the fact that the Act gives power to prolong contractual tenancies, as such, beyond the date when, according to their terms, they could have been terminated. Its wording is inapt to cover the suggested severance contended for here. One would need some such words as these: "Where a notice to quit has been held "inoperative under s. 24 in respect of an agricultural holding "which is part only of the lands comprised in the original "tenancy", and so on, giving the arbitrator power to take into account what has been severed in settling the reduced rent. Sub-section 2 of s. 8 makes it clear to my mind that this section is inapt for the purpose for which Mr. Ferns contends. One would expect words similar to those found in s. 33 of this Act. That is the last of three sections concerned with cases where the Act expressly provides for notice to quit in respect of part of an agricultural holding. This is authorized by s. 31 for a variety of purposes, for example, where the land is required for the provision of allotments. Section 32 gives the tenant the right to treat such a notice as a notice to quit the whole holding. Section 33 provides that where the landlord resumes possession of part of the holding under s. 31, or by virtue of a provision in the contract of tenancy, the tenant shall be entitled to a reduction of rent "of an amount to be settled by arbitration "under this Act, proportionate to that part of the holding and "in respect of any depreciation of the value to him of the "residue of the holding caused by the severance or by the use "to be made of the part severed". In other words, where the Act provides for severance, machinery is set up for enabling the rent to be reduced and provides for the basis of the reductions.

Assistance is, I think, also to be gained from the wording of s. 3 and s. 24. Section 3, sub-s. 1, reads as follows: "A tenancy "of an agricultural holding for a term of two years or upwards "shall, instead of terminating on the expiration of the term for "which it was granted, continue (as from the expiration of that "term) as a tenancy from year to year, but otherwise on the "terms of the original tenancy so far as applicable, unless, not "less than one year nor more than two years before the date "fixed for the expiration of the term, a written notice has been "given by either party to the other of his intention to terminate "the tenancy". The opening words themselves, I think, suggest that the Act contemplates a tenancy of an agricultural holding, not a tenancy which is of *or includes* such a holding. If Mr.

Ferns is right, this section would not operate on a cottage occupied by a postman. The tenancy quoad that cottage would cease on the expiry of the term. Again, there is no machinery for adjustment of the rent, and such a construction would lead to great confusion. Sections 23 and 24, to which I have already referred, use the words "notice to quit an agricultural holding or "part of an agricultural holding". The latter words are necessary having regard to s. 31. If Mr. Ferns is right one would expect in these sections words expressly covering the case where the notice to quit operates, as it must at common law, on the whole subject-matter, but where part only of the subject-matter is within the Act. The main structure of the Act, its wording and what it does not contain, are therefore, in my opinion, against the construction which the county court judge put upon s. 1. The judge was referred to, and naturally relied on, the passages which I have summarized from Tucker, L.J.'s judgment in *Dunn* v. *Fidoe* (8). Tucker, L.J., in that case referred to the fact that no provision seemed to have been made, at any rate in express terms, in the rest of the Act for the consequences of severance. No doubt on this issue, which was directly raised in this case, we have had the advantage of a much fuller consideration of the difficulties so arising which, as Swinfen Eady, M.R., in *In re Lancaster and Macnamara* (7) said, are relevant to the meaning to be given to the definition.

I have therefore come to the conclusion, this being in substance an agricultural tenancy, and the definition not providing for severance, that the tenant succeeds. If I had felt myself bound by *Dunn* v. *Fidoe* (8) to hold that the definition does provide for a severance in certain cases, I would have held that this did not cover cottages, such as those on this plot of land, not being occupied for the time being by agricultural workers. There is, of course, no such thing as permanence in human affairs, but an inn will presumably continue as an inn and a factory as a factory, though either might no doubt be converted into an agricultural building. A cottage, however, may at any time change hands. An agricultural worker may suceed to some one not engaged in agriculture. To treat such cottages, covered in what is in substance an agricultural tenancy, as coming within and going out of the Act according to the occupation of the tenants at the moment would be a result so absurd that only the clearest words would make me come to such a conclusion.

For these reasons I think that the appeal must be allowed.

JENKINS, L.J. I agree. The plaintiff landlords' argument, which prevailed before the county court judge, is substantially to this effect:—(i) The definition of "agricultural holding" in s. 1 of the Act of 1948 is so framed that where land in part agricultural and in part non-agricultural is held under a single contract of tenancy, at one entire rent, the agricultural part is an agricultural holding to which the provisions of the Act apply, whereas the tenancy quoad the non-agricultural part is unaffected by the Act.

---

(7) [1918] 2 K. B. 472

(8) [1950] W. N. 419; 66 T. L. R. (Pt. 2) 611.

(ii) It follows that in such a case, although under the contract of tenancy a valid notice to quit can only be given with respect to the whole of the land comprised in the contract, a notice so given, provided that in point of length it complies with s. 23, sub-s. 1, of the Act, is nevertheless effective to determine the tenancy quoad the non-agricultural land comprised in the contract, notwithstanding that it is rendered ineffective quoad the agricultural land owing to the withholding by the Minister under s. 24, sub-s. 1, or on appeal by the Agricultural Land Tribunal under s. 25, sub-s. 4, of the requisite consent to its operation.

(iii) In the present case the tenancy comprises (a) an agricultural holding within the meaning of the Act, consisting of the seven acres less the three cottages, and (b) non-agricultural land in the shape of the three cottages which, as their tenants are not agriculturally employed, are not "agricultural land" within the meaning of s. 1, sub-s. 2.

(iv) Therefore, although consent to the operation of the notice to quit was withheld on appeal to the tribunal, such withholding of consent only made it ineffective as regards the seven acres less the three cottages, and did not prevent it from achieving a valid termination of the tenancy so far as the cottages were concerned.

(v) Admittedly this argument involves the severance of a mixed tenancy of this description into two tenancies, the one being a tenancy of an agricultural holding within the meaning of the Act, and the other an ordinary tenancy of non-agricultural land, for which severance no express provision is to be found in the Act. But this consequence follows as a matter of necessary implication from the terms of s. 1, and any apportionment of rent necessitated by such severance can be effected by recourse to arbitration under s. 8.

It will be seen that the essential foundation of the landlords' argument is the construction placed on s. 1 of the Act. That section, read in conjunction with the definition of "contract of "tenancy" contained in s. 94, provides by sub-s. 1 that the expression "agricultural holding" means the aggregate of the agricultural land (as defined by sub-s. 2) comprised in a letting of land or agreement for letting of land for a term of years or from year to year. Sub-s. 2 defines "agricultural land" as land used for agriculture which is so used for the purposes of a trade or business, and "agriculture" is defined in s. 94 as including a variety of pursuits which need not be here stated in detail.

Speaking for myself, and treating the question first of all as turning simply upon the construction of s. 1 in the light of the definitions in s. 94 and without regard to any of the other provisions of the Act, I find it impossible to exclude from the definition of "agricultural holding" provided by s. 1 "the land "used for agriculture" comprised in a letting or agreement for the letting of land, merely on the ground that such letting or agreement for letting also includes other land not so used. So far, therefore, I find myself in accord with the view expressed by Tucker, L.J., in *Dunn* v. *Fidoe* (8). I do not think that *In re Lancaster and Macnamara* (9) affords any direct support for the contrary opinion, as the definition contained in s. 48, sub-s. 1, of the Act of 1908 is in entirely different terms. That case does, however, afford useful guidance as to the bearing of other provisions of the Act on the effect of the definition, a matter to which I will return at a later point in this judgment.

Assuming, for the sake of argument, that the construction which I have here provisionally placed on s. 1, and for which the landlords contend, is right, does it follow that they are entitled to the relief granted by the county court judge? In my view, it does not. For this purpose I also provisionally accept the landlords' contention that the circumstances of the case, as regards the occupations of the tenants of the three cottages, are such as to support the conclusion that the agricultural holding here in question cannot include the three cottages.

On this footing, what is the position? So far as the contract of tenancy is concerned, it could be determined, if at all, only as to the whole subject-matter of the tenancy, agricultural and non-agricultural, by one and the same notice to quit. How has the Act affected that state of affairs? So far as the agricultural holding is concerned, s. 23, sub-s. 1, enacts that a notice to quit is invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of the tenancy. But I cannot construe that provision, in its application to a "mixed" tenancy, as meaning that a notice to quit can validly be given to take effect on two different dates, namely, the contractual date as regards the non-agricultural part and the statutory date as regards the agricultural part. There is nothing in this provision to validate a notice to quit which would be invalid according to the terms of the contract of tenancy, which demand that the entire contract should be determined as regards its entire subject-matter by notice expiring on one and the same date. So far, therefore, the position appears to be that a "mixed" tenancy can only be determined by the notice which the statute enjoins with respect to the agricultural holding included in such tenancy. Then, by s. 24, where notice to quit an agricultural holding is given, and the tenant within the prescribed time serves the appropriate counter-notice, the notice to quit shall not have effect unless the Minister under that section, or the Agricultural Land Tribunal on appeal under s. 25, sub-s. 4, consents to the operation thereof.

---

(8) [1950] W. N. 419; 66 T. L. R. (Pt. 2) 611.

(9) [1918] 2 K. B. 472.

What is the effect of that provision in the case of a "mixed" tenancy containing no special provisions as to giving notice piecemeal? The notice to quit, in order to be valid under the contract of tenancy, must relate to the entirety of the demised premises, agricultural and non-agricultural, and must take effect, if at all, as a determination of the entire contract as regards the whole of the property let. The Act does not say that in such a case the notice shall not have effect as regards the agricultural land, but shall nevertheless have effect as regards the non-agricultural land: it simply says the notice to quit shall not have effect. In the case put of a mixed tenancy, where the notice to quit to be valid under the contract is necessarily given with respect to the whole of the land comprised in the contract, that provision must, I think, render the notice to quit wholly inoperative for the purposes of the contract of tenancy as regards the whole of the land comprised in it, non-agricultural as well as agricultural. The Act confers no new power of partial determination, so as to enable a mixed tenancy to be determined as regards the non-agricultural land while continuing as regards the agricultural land. It simply says that the only notice to quit recognized by the contract, namely, a notice to quit taking effect with respect to the whole of the demised premises, shall not have effect. That may no doubt be taken as meaning in the mixed case "shall not "have effect as regards the agricultural land"; but the result is in my view the same: the Act prevents the notice from operating as a notice determining the entire contract; and, the contract not recognizing partial determination, the result, so far as I can see, is that the notice can have no operation at all under the contract.

I think that this is borne out by s. 31, which provides in sub-s. 1 that "A notice to quit part of an agricultural holding ". . . given by the landlord of the holding shall not be invalid "on the ground that it relates to part only of the holding" if it is given for certain specified purposes. That shows an appreciation of the objection under the ordinary contract of tenancy to a notice to quit part only of the demised premises, and of the need for a special statutory provision to enable such a partial notice to be validly given. There is no similar provision to meet the case of a "mixed" tenancy so as to enable it to be determined as regards the non-agricultural land where it cannot be so determined as regards the agricultural land.

Again, s. 33 makes provision for the adjustment of the rent payable in respect of the part of an agricultural holding retained by a tenant where possession of part has been resumed by the landlord under s. 31, sub-s. 1. No similar provision is to be found in the Act to meet the case of an agricultural holding forming a part of the land comprised in a tenancy where the landlord has resumed possession of the remainder (and non-agricultural part) of the demised premises. Section 8, relied on by the landlords, will not meet the case, as that section is clearly directed to the revision of an existing rent payable in respect of an agricultural holding, and what is here needed is a provision enabling a separate rent to be fixed for the first time in respect of an agricultural holding previously held under a tenancy agreement with other premises at one entire rent for the whole subject-matter of the demise.

These considerations lead me to the conclusion that even if s. 1 of the Act is given the meaning which, taken alone, its language, read in conjunction with s. 94, appears to me to indicate, the landlords here should not succeed, because the Act contains no such provisions for severance as would be required to enable a notice to quit in respect of a mixed tenancy to be given a separate and effective operation in regard to the non-agricultural part of the demised premises where it is rendered ineffective as regards the agricultural part by reason of the withholding of the requisite consent.

Moreover, these and other considerations to be collected from the various provisions of the Act appear to me to cast grave doubt on the prima facie construction of s. 1, taken alone. It is difficult to believe that if severance in the case of mixed tenancies were really intended, express provisions as to the effect of a notice to quit on the non-agricultural part, where the requisite consent is withheld as regards the agricultural part, of the demised premises would not have been included in the Act; and the same observation applies to the apportionment of rent in such a case.

Apart from these general considerations, there are several provisions in the Act which appear to proceed on the assumption that the tenancy under consideration comprises the agricultural holding and nothing more, besides forms of reference to the tenant, the landlord, the tenancy or the contract of tenancy in relation to the holding which suggest the same intention. Section 3, sub-s. 1, which converts "a tenancy of an agricultural "holding" for a term of two years or upwards as from its expiration into a tenancy from year to year, in the absence of written notice by either party within a prescribed time of his intention to terminate the tenancy, is hardly intelligible if it is to be applied in cases in which the tenancy does not relate exclusively to an agricultural holding.

A similar observation might be made with respect to s. 4. Then one finds in s. 5 provisions for settling the terms of "a "tenancy of an agricultural holding", where the terms are not reduced to writing or, so far as recorded in writing, are incomplete. This, surely, can only refer to a case where the tenancy in question comprises an agricultural holding and nothing more. That, indeed, is what the expression "a tenancy of an agricultural "holding" in itself strongly suggests. There are in the Act passim references to "a tenancy of an agricultural holding", "the tenant", or "the landlord" of an agricultural holding, or both (see, for instance, ss. 8, 9, 12), which naturally suggest an agricultural holding as the sole subject of the letting, and are hardly to be tortured into the framework of the definition given by s. 1 so far as it indicates the contrary. Perhaps even stronger are the references, which occur more than once, to "the contract "for a tenancy of an agricultural holding" (see s. 10), or "a "contract of tenancy of an agricultural holding" (see s. 15). I need not multiply examples. Section 18, which relates to distress, refers to "a landlord entitled to the rent of an agricul-"tural holding". That, to my mind, strongly suggests a rent attributable exclusively to an agricultural holding. Section 32, which enables a tenant who has received notice to quit part of an agricultural holding to serve a counter-notice accepting the notice to quit as a notice to quit the entire holding, is hardly consistent with the hypothesis that the tenancy might include non-agricultural land which, not being agricultural, would not form part of the holding. In such a case it is difficult to see what would happen to the non-agricultural residuum.

For these reasons I think that it may well be the case that, notwithstanding the construction I am disposed to place on s. 1, read only in conjunction with s. 94, the true conclusion to be collected from the provisions of the Act as a whole is that the Act, like its predecessor of 1908, only applies where an agricultural holding is the sole subject of a given contract of tenancy, or, in other words, that the law as stated in *In re Lancaster and Macnamara* (9) remains in this respect unaltered. On this basis one must look at the substance of the matter and see whether, as a matter of substance, the land comprised in the tenancy, taken as a whole, is an agricultural holding. If it is, then the whole of it is entitled to the protection of the Act. If it is not, then none of it is so entitled.

If that is the right test to apply, then I have no doubt that the whole of the land here in question is an agricultural holding.

(9) [1918] 2 K. B. 472.

The literal construction of the word "used" in s. 1, sub-s. 2, as requiring actual use of every inch of the holding for agriculture or for the purposes of an agricultural trade or business at any given time would make the Act wholly unworkable. The cottages here in question must, I think, be regarded as ancillary to the holding of seven acres of undeniably agricultural land. The whole, including the cottages, was let under an agreement in terms clearly appropriate to an agricultural holding. The character of the demised premises as agricultural or non-agricultural land cannot, in my judgment, be made to depend on the occupation of the persons to whom the cottages may be let from time to time. Else, by parity of reasoning, if the cottages were at any time vacant the property as a whole could not constitute an agricultural holding because the vacant cottages would not for the time being be used for agriculture. In my judgment the letting of cottages such as these to other persons because they are not required for agricultural tenants (or as may well be the case because possession cannot be obtained from the existing tenants) should not affect the result.

I would add that for similar reasons I do not think that the principle of severance of tenancies comprising both agricultural and non-agricultural land into a tenancy of an agricultural holding on the one hand and an ordinary non-agricultural tenancy on the other hand, even if the Act on its true construction enjoins such severance in appropriate cases, would produce any different result in the circumstances of the present case. On the facts of this case I think the true view is that the whole of the property let, that is to say the seven acres and the three cottages, is an agricultural holding within the meaning of the Act.

In the result, therefore, although the Act presents problems of construction which, speaking for myself, I find it impossible to resolve with any confidence, I cannot see that, on any construction of which the Act appears to me to be capable, the landlords' claim to possession of the three cottages in the circumstances of this case is made out. Accordingly, I would allow the appeal.

HODSON, J. I wish only to add a few words of my own to the judgments which have been delivered, because of the reliance placed by the plaintiffs on the language used by Tucker, L.J., in *Dunn* v. *Fidoe* (10). The county court judge, in his careful judgment, recognized as expressly left open the question whether s. 1, sub-ss. 1 and 2, of the Agricultural Holdings Act, 1948, effect a severance when a parcel of land is not used for agricultural purposes although the remainder of the demised land is so used.

In *Dunn* v. *Fidoe* (10) Tucker, L.J., expressed himself as

(10) [1950] W. N. 419; 66 T. L. R., pt. 2, 611.

follows: " I think it is quite a possible view that, having regard " to the scheme of the Act of 1948, the language of s. 1 and the " provisions of ss. 31 and 32, a notice to quit premises . . . " could be held to be invalid without consent in so far as it " applies to the agricultural portion but valid for the remainder ". No severance had been effected by the decision of the county court judge in that case, and the question of severance did not directly arise. He held that the land and inn comprised in the tenancy together constituted an agricultural holding within the definition of s. 1 of the Act of 1948, and this court upheld his decision on the facts of that case, the inn being used not only for its normal purpose, but also for the tenant's agricultural business. Part of the ratio decidendi of Tucker, L.J.'s judgment appears, however, to have been that the test of dominant or main user had applied under earlier definitions but no longer applied in view of the changed wording of s. 1 of the Act of 1948. Under the Agricultural Holdings Act of 1908 the definition of " holding " in s. 1 is, so far as here relevant, " any parcel of land held by " a tenant which is either wholly agricultural or wholly pastoral " or in part agricultural and as to the residue pastoral ".

In *In re Lancaster and Macnamara* (11), decided under the Act of 1908, an inn and farm were let together at an entire rent under a single agreement of tenancy and the subject of the letting was held not to be an agricultural holding. The rateable value of the inn was very much less than that of the land but the test of dominant user was not applied. Swinfen Eady, M.R., and Scrutton, L.J., both proceeded on the footing that you have to look and see whether or not a substantial part of the holding is used for non-agricultural purposes. Scrutton, L.J., said (12): " If you find any substantial part of the land used for a purpose " which is neither agricultural nor pastoral, Parliament . . . has " not thought it right, in my view, to give compensation either " in respect of the whole land, or in respect of that part of it " which is wholly devoted to pasture ". I prefer this wording to the formula " dominant or main user ", which was put forward by counsel for the landlord in *Dunn* v. *Fidoe* (13). I think that the test as put in the judgment I have quoted justifies the decision in *Dunn* v. *Fidoe* (13), irrespective of the change which Tucker, L.J., considered had been brought about by the definition contained in s. 1 of the Act of 1948.

I am of opinion that the reasoning applied in *Macnamara's* case (14) applies here, and that the court has in each case to consider whether land as a whole comes within the definition of

---

(11) [1918] 2 K. B. 472.

(12) Ibid. 483.

(13) [1950] W. N. 419; 66 T. L. R., pt. 2, 611.

(14) [1918] 2 K. B. 472.

s. 1 of the Act of 1948, and, in arriving at this conclusion, to decide whether a substantial part is at the relevant date used for a purpose which is not agricultural. In my judgment the holding under our consideration, let as it was by an agricultural lease, is not taken out of the definition of an agricultural holding in s. 1 of the Act of 1948 because of the user of the three cottages, even though two of them were never occupied by farm labourers, either at the time of the letting or subsequently. I am fortified in this conclusion by the decision in *In re Russell and Harding's Arbitration* (15) (decided under the Act of 1908), where the farmhouse let by an agricultural lease was turned into a guest house during the tenancy without, in the opinion of the court, altering the status of the land demised from that of an agricultural holding.

In view of the nature of the cottages themselves I am not driven to the conclusion that a substantial part of the land was used for non-agricultural purposes, so as to take the holding out of the definition of s. 1 of the Act of 1948. If I were driven to such a conclusion, I should be of opinion that the whole holding was outside the definition, and for the reasons already given by Somervell, L.J., that severance could not be effected. I agree, therefore, that the appeal should be allowed.

Appeal allowed.

Solicitors: *Taylor, Jelf & Co., for Eddowes, Simm & Waldron, Ashbourne; Collyer-Bristow & Co., for Wilkins & Thompson, Uttoxeter.*

A. W. G.

---

(15) 128 L. T. 476.

C. A.
1950
Dec. 1, 4, 5.

Evershed, M.R., Singleton, L.J., and Danckwerts, J.

REGIONAL PROPERTIES CO. LD. *v.* FRANKENSCHWERTH AND CHAPMAN.

[Plaint No. FF 369]

Landlord and Tenant—Monthly tenancy—Notice to quit—Assignment of property before termination of notice to quit—Failure to obtain landlord's leave to assign—Leave not required by tenancy agreement—Right to recover possession—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 *Geo.* 5, *c.* 32), *Sch. I, para (d).*

The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch. I, para. (*d*) provides: "The court shall . . . have "power to make or give an order or judgment for the recovery of "possession of any dwelling-house to which the principal Acts apply ". . . without proof of suitable alternative accommodation (where the "court considers it reasonable so to do) if . . . (*d*) the tenant "without the consent of the landlord has at any time after the "31st day of July, 1923, assigned or sub-let the whole of the dwelling-"house, or sub-let part of the dwelling-house, the remainder being "already sub-let".

The expression "the tenant" in that paragraph means, or at least includes, a contractual tenant.

Where a tenancy agreement does not provide that the tenant may not assign or sub-let without the consent of the landlord, the words "without the consent of the landlord" in the paragraph nevertheless apply to make that consent necessary, for the words "without the consent of the landlord" cannot, in the case of a contractual tenant, be read as subject to the substantial implied qualification "where a consent to assign or sub-let is by the con-"tract of tenancy required".

Where, therefore, a contractual tenant, not prevented by the tenancy agreement from assigning the property let to him without the consent of the landlord, was given notice to quit, and three days before the notice expired assigned the property for the remainder of the term with the intention that the assignee could hold over as statutory tenant:—

Held, that the landlord was entitled to recover possession under Sch. I, para. (*d*), when the court considered it reasonable on the facts to make the order.

TWO APPEALS from Judge Clothier, sitting at Lambeth county court.

By an agreement in writing dated July 25, 1946, the plaintiff landlords let 125 Pullman Court, Streatham, to the first defendant, Kurt Frankenschwerth, as from July 19, 1946, on a monthly tenancy at the monthly rent of 9*l*. 11*s*. 4*d*. It was a dwelling-house within the Rent Restriction Acts. The tenancy was made determinable by one month's notice in writing given on the 19th day of a month to expire on the 18th day of the following month. The agreement contained the usual tenant's covenant for delivery up of possession, but no provision against assignment by the tenant without the leave of the landlords.

By an agreement dated January 21, 1948, the tenant sub-let the premises furnished to the second defendant, Leslie Charles Chapman, who thereafter remained in occupation of the premises.

On April 28, 1950, the landlords gave the tenant notice to quit to take effect on June 18, 1950. The tenant was himself willing to give up possession, but, out of consideration for the sub-tenant (who had been injured in the war, was about to undergo an operation and could find nowhere else to go to), he assigned the residue of the tenancy to him on June 15, 1950, with the intention of enabling the assignee to hold over as statutory tenant. He informed the landlords of this by letter of the same date. The tenant made the assignment without the leave of the landlords and at once removed his own furniture.

The landlords then brought proceedings in the county court against both the tenant and the assignee, claiming nominal damages against the tenant and possession and mesne profits against the assignee. The landlords relied on Sch. I, para. (*d*), of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, in support of their claim for possession.

The county court judge gave judgment against the assignee for possession of the premises within six months and for 34*l*. 3*s*. 8*d*. mesne profits; and against the tenant for 2*l*. damages for breach of the contract to deliver up possession of the premises. The tenant and the assignee each appealed. The tenant's appeal does not call for further report. It was allowed on the ground that, as full relief was given against the assignee for possession and for payment of rent or mesne profits and costs, there was no reason for making an order for damages for breach of contract—even nominal damages—against the tenant.

Pearl for the tenant.

H. Lester for the assignee. Sch. I, para. (*d*), of the Act of 1933 does not refer to a contractual tenant but only to a statutory tenant, who is thereby deprived of the right of disposing of his tenancy without the leave of the landlord. The authorities in point, referring back to the provision in identical terms in the Act of 1923, make this clear: see *Roe* v. *Russell* (1), *Haskins* v. *Lewis* (2), and *Skinner* v. *Geary* (3).

[SINGLETON, L.J. If para. (*d*) applies to statutory tenants, why does it do so exclusively?]

That is the effect of the language used. [Counsel referred to Megarry on the Rent Restriction Acts (5th ed.), p. 151.] The assignee here obtained an assignment independently of the Acts and only afterwards became a statutory tenant. It is in the light of this that the application of the Rent Restriction Acts must be considered. It is true that the assignment was made after the tenant had received notice to quit, but the notice had not expired. Why should this not be valid? There is no restriction on sub-letting.

[EVERSHED, M.R. What it has been sought to do in this case seems like a form of exploitation.]

If the contention that para. (*d*) applies only to a statutory tenant is erroneous, it can only apply to a contractual tenant who under the terms of his tenancy agreement has to obtain the consent of the landlord to assign or sub-let.

In *Swanson* v. *Forton* (4), it was contended that if a landlord

---

(1) [1928] 2 K. B. 117.
(2) [1931] 2 K. B. 1.
(3) [1931] 2 K. B. 546.
(4) [1949] Ch. 143.

C. A.
1950

Regional Properties Co. Ld. v. Frankenschwerth and Chapman.

did nothing and the tenant assigned, the landlord was entitled to say that he had assigned without leave. In the present case a provision against assigning without the landlords' consent had been struck out of the draft tenancy agreement by the tenant, and this was accepted by the landlords. The words in para. (*d*) "without the consent of the landlord" must in such a case be qualified and be taken in the case of a contractual tenancy to mean "without the consent of the landlord where a consent to "assign is by the contract of tenancy required". Cannot the assignee here claim to stay on as statutory tenant now that the contractual tenancy has expired and so avoid expulsion?

[Evershed, M.R., referred to *Dalrymple's Trustees* v. *Brown* (5) and the view there expressed by Lord Normand.]

That view is not one that this court need to or should adopt. Can it be said here that the landlords are entitled to possession against the assignee in view of his occupation for a considerable time as sub-tenant immediately before the assignment to him? The cases show that the court is not construing Acts as to which it is likely that a contractual tenant with a right to assign without the consent of the landlord should find this power taken away.

Lastly, even if para. (*d*) applies here, it is only if the court considers it reasonable that the power to eject the assignee should be exercised. That depends, no doubt, on the facts, but the county court judge misdirected himself on the facts which showed the strong claim of the assignee to protection.

Alan Campbell, for the landlords, was not called upon to argue on the assignee's appeal.

Evershed, M.R. [after stating the facts]:—The landlords' case is of the simplest possible character. Mr. Campbell's argument on their behalf is that the words "the tenant without "the consent of the landlord has . . . assigned" mean neither more nor less than what they say. In this case there was an assignment, and, as the judge found and was undoubtedly the fact, the assignment was made without the consent of the landlords. Therefore, jurisdiction is conferred upon the court to make an order for possession where the court considers it reasonable so to do. Nothing, one could imagine, could be much simpler than that: it involved the consideration of eight simple English words.

The argument for the assignee was to the effect that in Sch. I, para. (*d*), the words "the tenant" mean only a statutory tenant; and, alternatively, that if the words "the tenant" include a contractual tenant, then the few words of para. (*d*) must have read into them a substantial qualification to this effect: "in the case of a contractual tenant where a consent "to assign is by the contract of tenancy required". When para. (*d*) is treated simply as an ordinary matter of construction, I cannot accept that alternative submission. I think that the words mean what they say. It is true that in the other paragraphs in juxtaposition to para. (*d*) jurisdiction is conferred when some breach of obligation or similar act on the part of the tenant against whom the proceedings will be brought for possession is committed. But, in considering this paragraph which plainly contemplates an assignment of the whole term demised, I should have supposed, as a simple matter of English, that it referred to an assignment putting the assignee into possession and not the assigning tenant. There seems to me to be no reason for expanding the language of para. (*d*) by supposing that it must be confined to occasions when the tenant commits a breach of a provision in the tenancy agreement. I feel some sympathy for the assignee, and I merely refer to what was done by the word "device", following the language of the judge, without imputing to the assignee any dishonest intention or other reprehensible conduct. Moreover, I sympathize with the view put forward on his behalf that at first approach para. (*d*) would be supposed to refer to one or other of the alternatives suggested.

---

(5) 1945 S. C. 190, 193.

There is, however, a great difficulty in the way of treating para. (*d*) as referring only to a statutory tenancy. The paragraph first appeared in s. 4 of the Rent Restriction Act of 1923, when it was substituted as s. 5, sub-s. 1 (*h*), of the principal Act. That was during the comparative youth of this legislation, and, as Scrutton, L.J., observed in his judgment in *Skinner* v. *Geary* (6), the court was then in the process of formulating the view, which it thereafter very firmly laid down on more than one occasion, that the so-called statutory tenancy was not a right of property capable of transmission by assignment or gift or devise. As therefore, the court had laid it down quite clearly before 1933 that a statutory tenancy was not capable of assignment, it seems impossible to suppose that Parliament (which according to well-established principles must be taken to legislate in the light of judicial decisions upon existing Acts) should, ten years later, have repeated the exact phrase in s. 4, sub-s. 1 (*h*), of the Act of 1923, if assignment by a statutory tenant were contemplated and that was something which the law could not recognize. I do not propose to refer to the cases which Mr. Lester cited—*Roe* v. *Russell* (7) and those which follow it—save to say that the language of Scrutton, L.J., cannot, on any view, be said to amount to a determination that s. 4, sub-s. 1 (*h*), of the earlier Act applied exclusively to statutory tenancies.

(6) [1931] 2 K. B. 546.

(7) [1928] 2 K. B. 117.

C. A.
1950

REGIONAL PROPERTIES CO. LD. *v.* FRANKENSCHWERTH AND CHAPMAN.

Evershed, M.R.

But, in any case, we have to consider the First Schedule to the Act of 1933, which was passed and became law after the decisions in *Roe* v. *Russell* (7) and *Skinner* v. *Geary* (8); and it is significant that from a short time after the passing of the Act of 1933 the view of textbook writers (who have guided practitioners) has been clearly to the effect that para. (*d*) must be read as including the case of an assignment by a contractual tenant during the term. Thus in the Rent and Mortgage Interest Restrictions Book (17th ed.), published in 1938 by the editors of Law Notes, which is well known to be used as a guide and on which, therefore, many people must have regulated their affairs, the note to para. (*d*) is: " This was a new paragraph " introduced by the Act of 1923. It is re-enacted here without " alteration. Since the statutory tenancy is not assignable . . . " this paragraph can only refer to assignment of an existing con" tractual tenancy ". That view has been consistently maintained, and is also referred to in Megarry on the Rent Restriction Acts. I thus derive support for the view I have indicated that, as a matter of language and in the light of the decisions of the court, the word " tenant " in para. (*d*) is not confined in meaning to the statutory tenant.

It is unnecessary to this case to say finally whether it would cover the case of a purported assignment by a statutory tenant, but I am at least satisfied that the paragraph does cover the case of an assignment by the contractual tenant before the contractual term comes to an end. The reason for such a provision, I think, is not far to seek. No one has better laid down the principles of the Rent Restrictions Acts than Scrutton, L.J., and he has pointed out that their object was to protect persons who were tenants from eviction, and not to provide some means whereby tenants could make a financial gain out of dealings with rent-controlled property. I am not saying that this is that type of case; the evidence is that the tenant made no profit and received nothing out of the transaction; but it might be otherwise in other cases; and I think what the legislature was saying was: it was not interested in the case of a contractual tenant who would, if he continued to live in the place after the termination of the contract, have become entitled to the protection of the Act, but who chose, for consideration large or small, to put someone else in the position of being able to claim the benefits of the Acts; and that if the real tenant did not want to live in the premises there was no reason why the landlord should not have some say on the question who should occupy them.

The alternative contention is that if the words " the tenant " mean exclusively, or include, a contractual tenant, the words in para. (*d*), " without the consent of the landlord ", refer only to

(7) [1928] 2 K. B. 117.

(8) [1931] 2 K. B. 546.

cases where that consent is required by the contract. Mr. Lester submitted that this must be the meaning, because the results otherwise would be so surprising. The results have not surprised me, and I hope Mr. Lester will forgive me for not discussing at length all his points. The words seem perfectly simple and straightforward, and I cannot see what justification there is for reading into them a qualification never placed there by Parliament. It is plain that during the term of the contract of tenancy the tenant can assign or underlet without asking the landlord's consent if there is no prohibition against this in the contract. But what Parliament has said is that, whether or not the landlord's consent is made necessary under the contract such consent to an assignment is still necessary because it is fair that the court should have power to make an order for possession against an assignee who is unknown to and not approved of by the landlord.

It is said that in this case because the definition clause in the tenancy agreement says that the word "tenant" shall include assignees, and because (though I doubt if this is admissible evidence) a clause prohibiting assignment without consent was struck out from the draft, therefore any assignment made at any time during the term by the tenant has inferentially the consent of the landlord within the meaning of para. (*d*). I cannot accept that argument. I think that this paragraph means what it says, and that "the consent of the landlord" means the consent actively given to a particular tenant.

I am supported in that opinion by the view taken by the Inner House of the Court of Session in *Dalrymple's Trustees* v. *Brown* (9). It need not be said that a decision of that court is not binding on this court, but since the Acts to be construed are the same in both Scotland and England, and since cases under those Acts go to the House of Lords from both Scotland and England, it is plainly desirable that the construction of the relevant parts of the Acts should be the same on both sides of the border. I should therefore always be inclined to follow in cases of this kind the decision of the Inner House. The Lord President, Lord Normand, expressed in better language than I could use what I think is the answer to this part of the argument. There there was a sub-letting by the tenant of urban property in Scotland during the pendency of the contract of letting but without the landlord's consent. It was argued that, since it is by the law of Scotland unnecessary in such cases to get the consent of the landlord to sub-let, therefore it must be supposed that proleptically the consent is given in each case.

The answer to the argument is concisely stated by Lord Normand: "The law is that the tenant of urban tenements in

---

(9) 1945 S. C. 190, 192.

C. A.
1950

Regional Properties Co. Ld. v. Frankenschwerth and Chapman.

Evershed, M.R.

"Scotland has an implied power to sub-let without the consent "of the landlord; and not that there is an implied consent of "the landlord to adopt an urban sub-let. Moreover, any sub-"let at common law endures at common law only for the period "of the tenant's lease, and has nothing to do with the protection "for an extended period under the Rent Restriction Acts. I "am clear that the words 'without the consent of the landlord' "in para. (*d*) of the First Schedule to the Act of 1933 mean "without actual consent given by the landlord, either expressly "or by implication. That necessarily requires that the landlord "should have had knowledge of the sub-lease"; and he says that in that case the landlord had no knowledge of and gave no consent to the sub-letting, express or implied. I respectfully adopt that reasoning, and apply it to this case.

The result, therefore, in my judgment, is that the county court judge was right when he concluded that there was here jurisdiction on his part to make an order for possession. It was then suggested that it was not reasonable for him to do so. On that matter I find this passage in Megarry on the Rent Restriction Acts (5th ed.), p. 144, a citation from a judgment of my own: "On an appeal it will be assumed not only that, where "evidence as to reasonableness had been led, the judge applied "his mind to this issue in making an order for possession, but "also that any decision on reasonableness was given after the "judge had properly applied his mind to all relevant considera-"tions. It is otherwise where the judge has not heard all the "evidence, for the question of reasonableness can rarely be "properly decided, even in favour of the tenant, without hearing "the whole of the evidence, for the tenant as well as for the "landlord". I also refer to the well-known statement of Lord Greene, M.R., in *Cumming* v. *Danson* (10), that, in deciding the matter of reasonableness, the duty of the judge is to take into account all relevant circumstances in what the learned Master of the Rolls called the broad common-sense way of a man of the world.

In this case the county court judge indicated that he felt considerable sympathy for the assignee, a man of unimpeachable character, who had served his country with distinction and to his own bodily hurt. That was a matter which the judge must take into account. On the other hand, he took it into account that this assignment and the shifting of the furniture was a last-minute device intended to create a home for the assignee in time to enable him to enjoy the benefit of the Acts. It was said in evidence that there was a long waiting list for tenants, and it is to be noticed that the assignee was a man of some standing in the Civil Service, and therefore in the enjoyment of a larger and

10) (1942) 112 L. J. (K. B.) 145, 147; 59 T. L. R. 70.

more secure income than some other persons. All those matters the judge might plainly take into account. I think that he was entitled to consider the whole of the circumstances of the case and that he was entitled to form the view that it would be reasonable in this case to make an order for possession while giving the assignee a certain time within which to find somewhere else to live. There is no basis on which this court could be asked to make some different order or, as is commonly the case when reasonableness is in question, to order a new trial. The result, therefore, is that the assignee's appeal must be dismissed.

[His lordship then gave judgment allowing the tenant's appeal, which, as stated, does not call for report.]

SINGLETON, L.J. I am of the same opinion. The landlords' claim was based on para. (*d*) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. [His Lordship read it.] Much criticism has been directed to the complications of the Acts as they now stand. For my part I do not think that there is any complication in para. (*d*) of Sch. I to the Act of 1933. Mr. Lester referred to a considerable number of authorities in seeking to persuade the court to put the construction which he desired upon that paragraph. We have before us an assignment of June 15, 1950, made between the tenant of the one part, and the assignee of the other part. It is quite clear that there was an assignment of the whole of the dwelling-house for the residue of the term from the one to the other on this date. The consent of the landlord was not asked and Mr. Lester submitted that this was not necessary as there was no provision against assigning without the plaintiffs' consent in the tenancy agreement. I do not think it necessary to refer to authorities to answer that problem. In any event the words of Lord Normand in *Dalrymple's Trustees* v. *Brown* (11), to which my Lord referred, are quite clear, and I accept them. If the words in para. (*d*) are to be read in their ordinary sense, it is clear that the tenant, without the consent of the landlord, after July 31, 1923, assigned the whole of the dwelling-house.

The remaining point raised on the assignee's appeal is whether it was reasonable to make an order for possession? The court has power, if the case falls within para. (*d*), to make an order "where the court considers it reasonable so to do". A considerable part of Mr. Lester's argument was addressed to this point, and he submitted that the judge, in coming to the conclusion that it was reasonable to make an order, applied wrong tests and took wrong matters into consideration. The judge stated that the assignee was a perfectly respectable man, but he

(11) 1945 S. C. 190.

referred to the device which had been carried through in June, 1950, and said that he did not like that which had been done. In all the circumstances, bearing in mind the position of the assignee and his character and the device to which resort had been made, the judge thought it reasonable to make an order.

Mr. Lester submitted to this court that the judge was not entitled to consider the device. I wonder why not. In the first place it is clearly for the county court judge to consider whether he thinks it reasonable, on the evidence before him, to make an order, and this court will not lightly interfere with his view. The assignee before the assignment took place had been for a long time a sub-lessee from the tenant of the dwelling-house furnished. The lease provided for a rent of 9*l.* 11*s.* 9*d.* a month payable in advance. The sub-letting of the premises furnished had been at one time for five guineas a week, reduced later to three-and-a-half guineas a week. When notice to quit was given by the landlords to the tenant, he was willing that possession should be given, and he proceeded to give notice to the assignee. I would refer to the following passage in the evidence of the assignee: "On or about June 7, 1950, within two days of "receiving a letter from [the landlords] we had a joint consul-"tation with my solicitor and [the tenant's] solicitor. I believe "counsel were also present. As a result of that consultation "the letters of June 15 were sent and the assignment of [the "tenant's] tenancy to me was executed on the same day. I "surrendered my furnished tenancy to [the tenant] and brought "my furniture out of store". The sub-letting therefore ended, and what had been a furnished letting became an assignment of the residue of the term, amounting to three days, held by the tenant. Messrs. Alfred Bieber & Bieber, who act for the assignee, wrote on June 15 to the owners pointing out the change, and on the same day they sent a cheque to the owners. The landlords' solicitors very properly replied that they would not accept the cheque. The judge spoke of this as a device on the part of the tenant and the sub-tenant, and that term could properly be applied to it. He took it into consideration, and I think that he was entitled so to do. After all, life between landlord and tenant ought not to consist of a landlord's seeking all the time to get possession of his property and, on the other hand, of the tenant's seeking to defeat the landlord's rights by a device or a trick. If these things go on on the one side or the other the judge is entitled to consider them. It may well be that in other circumstances he might have said that strictly the landlords were entitled to an order for possession, but that in view of the fact that the assignee had been in the premises a long time, and in view of the fact that he had served his country and suffered grievous wounds, he would not make an order. On the other hand, he might well think that the landlords had been kept out of their property, that there was a sub-letting furnished by the tenant which lasted for a long time, and that then a device was resorted to in an effort to defeat the landlords. In such circumstances it is not surprising that the judge took the other view and made the order for possession. After all, there ought to be a sense of fair play in this life and the judge was entitled to take those matters into consideration. He considered it reasonable to make the order, and I see no reason whatever to interfere with the judgment which he formed.

[His lordship gave a short judgment agreeing that the tenant's appeal should be allowed.]

Danckwerts, J. I also agree. The Master of the Rolls has expressed the reasons for dismissing the appeal of the assignee so fully that it is unnecessary for me to add anything in regard to those reasons, with which I agree.

I would, however, observe that a tenant, assignee, or subtenant, who continues in possession after the contractual period of the tenancy has come to an end in the case of a house to which the Rent Restriction Acts apply, retains his possession lawfully under s. 15 of the Act of 1920, and he continues to occupy upon the terms of the tenancy so far as they are applicable to that situation. Sub-s. 3 recognizes him as having an interest. In those circumstances it seems to me that the sum which is awarded to a landlord who recovers possession pursuant to the Act should be described as rent rather than mesne profits.

Tenant's appeal allowed.
Assignee's appeal dismissed.

Solicitors: *Godfrey Davis & Foster; Alfred Bieber & Bieber; Theodore Goddard & Co.*

H. C. G.

REX *v.* LONDON, ETC., RENT TRIBUNAL.
Ex parte HONIG.

1950
Dec. 8.

Lord Goddard, C.J., Hilbery and Parker, JJ.

Landlord and tenant—Rent control—Reference of tenancy agreement to rent tribunal—Application for reduction of rent—Dispute as to existence of tenancy at time of reference—Fact collateral to specific jurisdiction — Power of tribunal to decide — Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 2, *sub-s.* 1*—Landlord and Tenant (Rent Control) Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 1, *sub-s.* 1.

1950

Rex
v.
London,
etc., Rent
Tribunal.
Ex parte
Honig.

Where a tenant refers a contract of tenancy to a rent tribunal under the provisions of the Furnished Houses (Rent Control) Act, 1946, or the Landlord and Tenant (Rent Control) Act, 1949, for the purpose of obtaining a reduction of rent, and, at the hearing before the tribunal, the landlord alleges that the tenancy had been lawfully determined before the date of the reference, the tribunal have jurisdiction to inquire into and decide the question of the existence of the tenancy since it is a fact collateral to the question specifically submitted to their jurisdiction, namely, the fixing of a reasonable rent.

Application for an order of certiorari.

On March 21, 1949, the applicant, Emanuel Honig, let to one Albert Shomade two furnished rooms in a house, 108 East India Dock Rd., on a weekly tenancy at a rent of 1*l*. 7*s*. 0*d*. a week. A week's notice to quit dated April 18, 1950, was served on the tenant requiring him to give up possession on Monday, May 1, 1950. The tenant remained in possession and, on June 1, 1950, acting under the Furnished Houses (Rent Control) Act, 1946, he referred his contract of tenancy to the rent tribunal with the object of securing a reduction of rent. At the hearing before the tribunal on June 28, 1950, it was submitted on behalf of the landlord that the notice to quit given to the tenant was a good one and consequently that, when the agreement was referred on June 1, 1950, there was no contract of tenancy in existence. The tenant alleged that the notice to quit, was, by reason of the fact that his tenancy was one from Saturday to Saturday, whereas the notice given to him expired on Monday, June 1, invalid, with the result that his contract of tenancy was still in existence at the time when it was referred to the tribunal, so that they had jurisdiction to entertain it.

The tribunal decided that the notice to quit was bad and that they had jurisdiction to entertain the reference. They accordingly heard the case and reduced the rent to 17*s*. 6*d*. a week.

The landlord applied for an order of certiorari on the ground that the tribunal had no jurisdiction to decide the question of the validity or otherwise of the notice to quit.

Magnus for the landlord. The order of the tribunal fixing the rent at 17*s*. 6*d*. a week should be quashed. The question for determination is whether the rent tribunal had jurisdiction to decide on the validity of the notice to quit given by the landlord. The notice was good on the face of it and, that being so, it is submitted that, having regard to the methods employed by the tribunal for obtaining information and of taking evidence, which is not given on oath, they ought not to take on themselves the duty of deciding on its validity. [He referred to *Rex* v. *Hackney*, *Islington and Stoke Newington Rent Tribunal; Ex parte Keats* (1) and *Reg.* v. *Commissioners for Special Purposes of the Income Tax* (2).]

Ashworth for the tribunal. There is no ground for certiorari here since the tribunal acted within their jurisdiction. Before they could decide whether the rent was reasonable, they were first bound to consider whether a tenancy existed; and, that being a fact collateral to the matter specifically submitted to their jurisdiction, namely the question of the rent, they had power to decide it: see *per* Atkin, L.J., in *Rex* v. *Lincolnshire Justices; Ex parte Brett* (3).

LORD GODDARD, C.J. This case raises a question of some importance which has been mooted more than once in these rent tribunal cases, although I think that this is the first occasion on which it has come up directly for decision.

The point is this: when a tenant refers a contract or a purported contract of tenancy, to a rent tribunal under the Furnished Houses (Rent Control) Act, 1946, or under the Landlord and Tenant (Rent Control) Act of 1949, to which I suppose exactly the same considerations apply, and the landlord maintains that the tenancy has been determined, can the tribunal inquire into the question whether the tenancy has been lawfully determined? I do not think that it would be contended, at any rate under the Act of 1949, that if, before the contract was referred, the tenancy had been lawfully determined, the tribunal would have any jurisdiction; but the question which we have to decide is whether, when there is a dispute on the question whether the tenancy has been determined or not, the tribunal can inquire into that matter in order that they may determine whether or not they have jurisdiction to hear the application. That, I think, fairly states the question which we have to decide.

Here, before the matter had been referred to the tribunal, the landlord, purported to give the tenant a notice to quit for a particular day. The tenant then referred the matter to the tribunal while he was still in occupation. As occupier, he might have been holding over merely as a trespasser, or by agreement, or under the terms of his tenancy because it had never been properly determined.

When the matter came before the tribunal, the landlord took the objection that there was no contract of tenancy in existence at the time when the matter was referred, because he had given the tenant a valid notice to quit. The tenant, on the other hand, said that there was a contract in existence at the time when it

(1) [1950] 2 All E. R. 138.
(2) (1888) 21 Q. B. D. 313.
(3) [1926] 2 K.B. 192, 201.

was referred to the tribunal, because the notice to quit was invalid, the actual question between the parties being whether the tenancy was a Saturday-to-Saturday, or a Monday-to-Monday tenancy. The landlord contended that the latter was the case, and said that he had given his notice to quit on that basis and that the notice to quit was good. If the tenancy was a Saturday-to-Saturday tenancy the notice to quit was bad.

The tribunal inquired into the matter and came to the conclusion that the tenant's contention was right and that the tenancy was one from Saturday-to-Saturday. On that footing they decided that there had been no valid notice to quit, that there was still a subsisting tenancy between the parties, and that therefore they had jurisdiction to embark upon the inquiry which was their province, namely, to decide what was a fair rent.

This order for certiorari is sought on the ground that the tribunal had no jurisdiction to inquire into the question whether the notice to quit was good or bad. In my opinion, however, they clearly had jurisdiction to inquire into the question whether there was an existing tenancy at the time when the matter was referred to them, because they would only have jurisdiction to act if that were the case.

The material words of s. 2, sub-s. 1, of the Furnished Houses (Rent Control) Act, 1946 are: " Where a contract has . . . been " entered into whereby one person . . . grants to another person " . . . the right to occupy as a residence a house or part of a " house . . . in consideration of a rent which includes payment " for the use of furniture or for services, whether or not, in the " case of such a contract with regard to part of a house, the " lessee is entitled, in addition to exclusive occupation thereof, " to the use in common with any other person of other rooms " . . . it shall be lawful for either party to the contract or for the " local authority to refer the contract to the tribunal for the " district . . .". The tribunal have then the duty to inquire into the matter, and to fix what they consider to be a fair rent in respect of the tenancy.

I need not for the purpose of this case refer to any question relating to security of tenure, although it seems to follow, by the operation of s. 5 of the Act, that if the tribunal give a decision the Act gives the tenant three months security of tenure from the date of the decision of the tribunal, unless they fix a shorter period.

The question in the present case is whether the tribunal can, first of all, decide the question of the existence of a tenancy. Unless they can do so, they can only proceed in a case in which both parties agree that a contract is in existence. If they did not so agree, it would, of course, always be open to a landlord to dispute the existence of the tenancy, in which case the parties would first of all be relegated to the county court to have that preliminary matter determined. There would be an action in the county court and, if the county court judge decided one way, the tenant would be able to go on with his reference, but if the judge decided the other way he would not. I cannot think that it was intended that anything of that kind should take place in connexion with proceedings under this Act.

It is not necessary, however, to embark upon any inquiry of that kind because the principles upon which these tribunals can act appear to me to be well established by decided cases. The first thing to consider is whether the tribunal, in order to obtain jurisdiction, must find that a certain state of affairs exists which is collateral to the main question. The question whether there is a contract or not seems to me to be collateral, and clearly collateral, to the main question which the tribunal have jurisdiction to decide, namely, what is the fair rent under a contract of tenancy. If there is no contract, they cannot, of course, determine that question. If there is a contract, they can determine it, and therefore they must decide for themselves in the first instance whether or not the contract exists.

In *Reg.* v. *Commissioners for Special Purposes of the Income Tax* (4), the leading case on this question, Lord Esher, M.R., thus stated the law: " When an inferior court or " tribunal or body, which has to exercise the power of deciding " facts, is first established by Act of Parliament, the legislature " has to consider what powers it will give that tribunal or body. " It may in effect say that, if a certain state of facts exists and " is shewn to such tribunal or body before it proceeds to do " certain things, it shall have jurisdiction to do such things, but " not otherwise. There it is not for them conclusively to decide " whether that state of facts exists, and, if they exercise the " jurisdiction without its existence, what they do may be " questioned, and it will be held that they have acted without " jurisdiction ". Then he points out that the legislature may give power to the court to come to a final decision upon that matter, and that if the statute does not give a right of appeal the matter cannot be questioned in any other court.

In my opinion this case is clearly one where, if a certain state of facts exists, that is to say, if there is a tenancy of the class contemplated by the Act, the tribunal have jurisdiction to proceed to do such things as they are entitled to do, that is to say, fix the rent; but I have no doubt that we can review the collateral matter which the tribunal have decided, namely the existence of a tenancy, as it is upon the existence of a tenancy that their jurisdiction depends.

---

(4) 21 Q. B. D. 313, 319.

I would also refer to *Rex* v. *Lincolnshire Justices, Ex parte Brett* (5), to which Mr. Ashworth called our attention, and more particularly to the judgment of Atkin, L.J., where he quoted with approval the statement of the law set out in Halsbury's Laws of England (1st ed.), Vol. X, §§ 374, 375, where it is said: "The "case is more difficult where the jurisdiction of the court below "depends, not upon some preliminary proceeding, but upon the "existence of some particular fact."—that is exactly the case here, the particular fact being whether there was a tenancy in existence or not—"If the fact be collateral to the actual matter, "which the lower court has to try, that court cannot, by a wrong "decision with regard to it, give itself jurisdiction which it would "not otherwise possess. The lower court must, indeed, decide "as to the collateral fact, in the first instance; but the superior "court may upon certiorari inquire into the correctness of the "decision . . .". That is what we have to do. I am of opinion that the tribunal in the present case had power to inquire into the collateral fact, namely, whether there was a contract, because it was only if there was a contract that they could exercise the jurisdiction which the Act of Parliament has given them. When they have decided that, it is open to the person who complains of that decision to ask this court to inquire into it by means of certiorari. In many cases—at any rate in some cases—this court has been able to inquire into the matter by means of documents and other information put before it and has come to the conclusion in some cases that the tribunal decided erroneously, and in others that it acted rightly.

In a case like the present, depending as it did on oral statement against oral statement, although it is not impossible for this court to inquire into the matter it appears to me to be quite impossible for us to hold that the tribunal below were wrong. At any rate, the onus of showing that they were wrong is upon the person who applies for certiorari. The matter here depended entirely on oral statements, and the tribunal saw the witnesses and heard them. It is true that they were not cross-examined on oath, because the proceedings before the tribunals are not conducted on oath. That, again, is a matter for the legislature and not for the courts. These tribunals act on all kinds of evidence which no court of law would look at for a minute. That is one of the difficulties which frequently arise in these cases, and very often arguments are addressed to the court on that ground. But this court has nothing to do with that. If Parliament chooses to set up a tribunal to decide disputed questions of fact not on oath, that is a matter for Parliament and not for this court. Where, as in the present instance, the

(5) [1926] 2 K. B. 192, 201.

matter depends on oral statements with flat contradictions on one side or the other, the only people who can come to a decision are those who see and hear the witnesses—I use that word in the colloquial sense of people called before a tribunal to depose to certain facts. The tribunal here heard both parties and came to a decision on the question of fact, and there is nothing before us which can satisfy us that they came to a wrong conclusion. Therefore, certiorari cannot issue and the application must be refused.

HILBERY, J. I am of the same opinion for the same reasons.

PARKER, J. I agree, and would only add that in more than one case this court has already held that rent tribunals are tribunals rather of the first type referred to by Lord Esher, M.R., in *Reg.* v. *Commissioners for Special Purposes of the Income Tax* (6). I need only refer to *Rex* v. *Hampstead and St. Pancras Rent Tribunal, Ex parte Ascot Lodge Ld.* (7), and to the two more recent cases concerning premiums, *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal, Ex parte Philippe* (8), and *Rex* v. *Barnet, etc., Rent Tribunal, Ex parte Millman* (9). As a result, it must not merely appear to these tribunals that the condition precedent to their jurisdiction exists, but it must in fact exist. In the two recent cases to which I have referred the jurisdiction of the tribunal depended on whether there was a premium within the Landlord and Tenant (Rent Control) Act of 1949, and this court decided that it must not merely appear to the tribunal that a premium existed but, in fact, a premium must exist before their jurisdiction arose. It seems to me that this is a very similar case to that. It must not merely appear that a contract exists on which they could exercise their jurisdiction: it must in fact exist.

The trouble in this case, as in all others, is that the onus is on an applicant to this court for certiorari to show that the decision of the tribunal is erroneous. In a case like this, where the decision depends almost entirely on oral testimony, the onus is particularly high, and in the present case the applicant certainly has not satisfied me that the decision was erroneous.

Application refused.

Solicitors: *J. Dalton; The Solicitor, Ministry of Health.*

P. B. D.

---

(6) 21 Q. B. D. 213.
(7) [1947] K. B. 973.
(8) [1950] 2 K. B. 506.
(9) (1950) 48 L. G. R. 549.

C. A.

1950
Nov. 15, 16;
Dec. 4.

Somervell, Denning and Birkett, L.JJ.

STAGG *v.* BRICKETT.

[Plaint No. 5654.]

Landlord and tenant—Rent restriction—Standard rent—Furnished letting—Purchase of furniture by tenant—No surrender of tenancy or variation of rent—Subsequent vacating of premises by tenant and unfurnished letting to plaintiff—First letting under Rent Acts—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1—*Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 10, *sub-s.* 1 (*as amended*)—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 2.

In December, 1940, a dwelling-house was let furnished to C. at a weekly rent of 25*s.* In February, 1941, C. purchased the furniture for 50*l.*, paying 40*l.* down and agreeing to pay the balance by weekly instalments of 5*s.* For the week following the purchase he paid the rent of 25*s.* and a 5*s.* instalment, but then, in consideration of his financial circumstances, the landlord agreed to reduce the rent to 1*l.* a week. There was no surrender or re-grant of the tenancy. Shortly afterwards C. vacated the premises and moved, with the furniture, to other quarters, and in June, 1941, the landlord let the house unfurnished to S. at a weekly rent of 3*l.* 10*s.* In 1950 S. applied to the county court under s. 11 of the Rent and Mortgage Interest Restrictions Act, 1923, to fix the standard rent of the premises, and the county court judge, reversing the finding of the registrar, fixed the standard rent at 25*s.* a week. On appeal by the landlord:—

Held, that, in determining whether a contractual letting was furnished or unfurnished, for the purpose of fixing the standard rent of the premises, the position must ordinarily be considered as at the time when the contract of tenancy was made; and that if, on the application of that test, it were found that the house was furnished at the beginning of the tenancy, it would retain the status of a furnished house throughout the tenancy, notwithstanding subsequent fluctuations in the quantity or value of the furniture or of the amount of the rent. It might happen that changes might occur which were so fundamental as to reverse the character of the letting and thus bring the premises within the Rent Restriction Acts; but that, in the circumstances of the case, the purchase of the furniture by C. could not be regarded as having so fundamental an effect as to change the character of the letting from a furnished to an unfurnished one, and the letting to S. was therefore the first letting and the standard rent was 3*l.* 10*s.* a week.

Jozwiak v. *Hierowski*, [1948] W. N. 201; 64 T. L. R. 322; and *Bowness* v. *O'Dwyer*, [1948] 2 K. B. 219, applied.

Brown v. *Robins*, [1943] 1 All E. R. 548, and *Seabrook* v. *Mervyn*, [1947] 1 All E. R. 295, distinguished.

Observations of Asquith, L.J., in *Welch* v. *Nagy*, [1950] 1 K. B. 455, 461, considered.

APPEAL from Judge Leon, sitting at Wandsworth county court.

In October, 1940, the defendant landlord, Brickett, purchased a house at 147 Kew Road, Richmond, and in December of the same year let it furnished to one Cockram at a rent of 25*s*. a week. The landlord was a councillor of Richmond Corporation, and Cockram was the borough mace-bearer. As such, Cockram had had living accommodation at the town hall. When that accommodation was destroyed by enemy action he was offered the house in Kew Road by the landlord. In February, 1941, Cockram purchased the furniture for 50*l*., of which he paid 40*l*. down, the balance to be discharged by weekly payments of 5*s*. He paid 25*s*. rent for one week after that arrangement had been made, but the landlord then reduced the rent to 20*s*. a week because Cockram could not afford 25*s*. in addition to the 5*s*. instalment. There was no surrender or re-grant of the tenancy. Shortly afterwards Cockram moved, with his furniture, into other quarters, and in June, 1941, the landlord let the house to the plaintiff, Mrs. Stagg, at a rent of 3*l*. 10*s*. a week. The premises were then unfurnished.

By the present proceedings the plaintiff applied to the registrar of the county court at Wandsworth to fix the standard rent of the premises under s. 11 of the Rent and Mortgage Interest (Restrictions) Act, 1923. The registrar, holding that the "first "letting" for the purpose of the Rent Restrictions Acts was the letting to the plaintiff tenant, fixed the standard rent at 3*l*. 10*s*. a week. On appeal by the tenant the county court judge reversed that decision and fixed the standard rent at 25*s*. a week, the rent at which the premises were let to Cockram. The landlord appealed.

Megarry for the landlord. The registrar found as a fact that the letting to Cockram was a furnished letting, and that there was no surrender and re-grant. It is submitted that the judge was in error in reversing that decision. *Jozwiak* v. *Hierowski* (1), is direct authority for the proposition that the status of the tenancy at the beginning of the letting must be taken, and that any variation in the furniture included in a furnished letting must be disregarded. In *Bowness* v. *O'Dwyer* (2), the court came to the same conclusion, deeming itself bound by *Jozwiak* v. *Hierowski* (1). In *Artillery Mansions Ld.* v. *Macartney* (3), it was held that regard must be had to the original letting and not to the assignment. That decision was founded upon the decision

(1) [1948] W. N. 201; 64 T. L. R. 322.

(2) [1948] 2 K. B. 219.

(3) [1949] 1 K. B. 164.

of the House of Lords in *Palser* v. *Grinling* (4). Mere variation of a tenancy does not by itself necessarily operate by way of surrender and re-grant. Whether there has been a surrender or re-grant is a question of fact, and on that question here reliance is placed on the finding of the registrar. In *Welch* v. *Nagy* (5), Asquith, L.J., expressed the view that if during the currency of a single lease, which was originally substantially a furnished one, the tenant bought all the furniture, the effect, while that lease was still in operation, was not to convert the tenancy into an unfurnished one for the purpose of the Rent Acts. That considered opinion was a general statement of principle which the Lord Justice found in *Bowness* v. *O'Dwyer* (6), and was part of the ratio of his decision. In the present case the landlord relies on *Jozwiak* v. *Hierowski* (7), and *Bowness* v. *O'Dwyer* (6).

[*Brown* v. *Robins* (8); *Seabrook* v. *Mervyn* (9); *Holme* v. *Brunskill* (10); and *Roberts* v. *Jones* (11), also referred to.]

L. A. Blundell for the tenant. It is no part of the tenant's case to seek to disturb the decisions in *Jozwiak* v. *Hierowski* (12), and *Bowness* v. *O'Dwyer* (13). The former was a very special case and was decided on its merits. In the latter case the court deemed itself bound by the former. The facts in the present case, so far as any question of principle is concerned, are indistinguishable from the facts in *Seabrook* v. *Mervyn* (14), on the decision in which case reliance is placed on behalf of the tenant. It follows from *Seabrook* v. *Mervyn* (14) that, once the furniture becomes the property of the tenant, the tenant becomes entitled to all the protection of the Rent Acts, and if a tenant is entitled to hold on and become a statutory tenant he must have had a standard rent. The opinion expressed by Asquith, L.J., in *Welch* v. *Nagy* (15), was obiter. Moreover, that case is distinguishable from the present case. In *Artillery Mansions Ld.* v. *Macartney* (16), no issue was raised as to the tenancy being discontinued. The fact that in the present case the negotiations for the possible sale of the furniture started at the time when Cockram went into occupation must not be overlooked. Having regard to that fact, and to the fact that after the subsequent purchase of the furniture the rent remained the same, there is material to show that the parties were contemplating that the unfurnished rent was 25*s.*

(4) [1948] A. C. 291.
(5) [1950] 1 K. B. 455.
(6) [1948] 2 K. B. 219.
(7) [1948] W. N. 201; 64 T. L. R. 322.
(8) [1943] 1 All E. R. 548.
(9) [1947] 1 All E. R. 295.
(10) (1877) 3 Q. B. D. 495.
(11) [1947] K. B. 221.
(12) [1948] W. N. 201; 64 T. L. R. 322.
(13) [1948] 2 All E. R. 219.
(14) [1947] K. B. 295.
(15) [1950] 1 K. B. 455.
(16) [1949] 1 K. B. 164.

[*Signy* v. *Abbey National Building Society* (17); *Chamberlain* v. *Farr* (18); and *Prout* v. *Hunter* (19), referred to.]

Cur. adv. vult.

Dec. 4, 1950. The following judgments were read:—

SOMERVELL, L.J. In these proceedings the tenant, Mrs. Stagg, applied to the registrar of Wandsworth county court to fix the standard rent of 147 Kew Road, Richmond, under s. 11 of the Rent Restrictions Act of 1923. She became a tenant of the premises, unfurnished, in June, 1941, at a rent of 3*l*. 10*s*., which she has since paid. Her present claim is that the standard rent is 25*s*., on the basis that the premises were "first let" at that sum within the definition of s. 12, sub-s. 1, of the Act of 1920. The registrar's findings of fact were not disputed. The landlord, the appellant here, bought the premises in October, 1940, for 900*l*. In December, 1940, they were let by him to one Cockram for 25*s*. a week. This was found to be a furnished letting at its inception. It was decided in *Signy* v. *Abbey National Building Society* (20), that the rent for such a letting is not to be taken, either gross or after apportionment, as the standard rent for the purpose of the definition. After Cockram had gone into possession he agreed to buy the furniture comprised in the original letting. This agreement was concluded in February, 1941. The price was 50*l*. 40*l*. was paid down and the balance was to be discharged by payments of 5*s*. a week.

The application proceeded on the basis that the rent remained unchanged for a week, at any rate. It was then reduced to 20*s*. because Cockram found that he could not afford to pay 25*s*. per week in addition to the 5*s*. a week for the furniture. Cockram was the mace-bearer of the borough of Richmond, and as such had living accommodation at the town hall. That accommodation was destroyed, as was also his furniture, by enemy action. The landlord was a councillor of the Richmond Council. There is, at any rate, indication of a charitable motive in the landlord's willingness to take 20*s*. instead of 25*s*., as stated above. If, however, there was an unfurnished letting within the definition, this is immaterial: see *Insall* v. *Nottingham Corporation* (21).

The relevant provisions of the Rent Restrictions Act are, first, s. 12, sub-s. 1, of the Act of 1920 (22), which defines standard rent;

---

(17) [1944] K. B. 449.

(18) (1942) 112 L. J. (K. B.) 206.

(19) [1924] 2 K. B. 736.

(20) [1944] K. B. 449.

(21) [1949] 1 K. B. 261.

(22) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1: "The expression "'standard rent' means the rent at "which the dwelling-house was let on "the third day of August, nineteen

s. 3, sub-s. 2 (*b*), of the Act of 1939 (22), which governs the question whether a letting is a furnished letting; and s. 10, sub-s. 1, of the Act of 1923 (22). Mr. Blundell, for the tenant, submits that there was an unfurnished letting at 25*s*. a week when the furniture was bought. If so, it is not disputed that that was the first letting which would determine the standard rent. Mr. Megarry submits that the whole of the letting to Cockram is to be regarded as a furnished letting and therefore to be disregarded in fixing the standard rent. On this basis it is not disputed that the first unfurnished letting was to the tenant at 3*l*. 10*s*., which would be the standard rent. Both sides rely on decisions of this court, and one of the questions is whether those decisions can be reconciled. The registrar decided in favour of the landlord. On appeal to the county court judge, that decision was reversed and the landlord appeals to this court.

Mr. Megarry relied first on *Jozwiak* v. *Hierowski* (23). In that case, which was one of a weekly tenancy, the rent paid and the furniture supplied varied. Both increased over the period of the tenancy, but there was no evidence to relate the one increase to the other. " It is not clear ", the court said, " whether progres-" sive rises in the rent were provided for when first the contract " of tenancy was entered into or whether from time to time the " quantum of rent was revised by agreement to keep pace with " the tenant's increased capacity to pay, and also with the " accession of new increments of furniture placed at his " disposal ". There was, as may well be the case here, a charitable motive, which as the court said, " did not make for " precision ". The court held on those facts that " the relevant " date on which to compare the part of the rent attributable to " the use of furniture with the whole rent is the time when the

---

" hundred and fourteen, or where the " dwelling-house was not let on that " date, the rent at which it was last " let before that date, or in the case " of a dwelling-house which was first " let after the said third day of " August, the rent at which it was " first let ".

Rent and Mortgage Interest Restrictions Act, 1923, s. 10, sub-s. 1: " For " the purposes of proviso (1) to " sub-s. (2) of section twelve of the " principal Act (which relates to " the exclusion of dwelling-houses " from the principal Act in certain " circumstances), a dwelling-house " shall not be deemed to be bona fide " let at a rent which includes pay-" ments in respect of attendance or " the use of furniture unless the " amount of rent which is fairly " attributable to the attendance or " the use of the furniture, regard " being had to the value of the same " to the tenant, forms a substantial " portion of the whole rent ".

Rent and Mortgage Interest Restrictions Act, 1939, s. 3, sub-s. 2: " The " principal Acts shall not, by virtue of " this section, apply . . . (*b*) save " as is expressly provided in the said " Acts, as amended by virtue of this " section, to any dwelling-house bona " fide let at a rent which includes " payments in respect of board, " attendance or use of furniture ".

(23) [1948] W. N. 201; 64 T. L. R. 322.

"original contract of tenancy was made". The claim was one for possession, and not for determination of the standard rent. The result, however, is that if the original letting was furnished, a tenant could not obtain, as it seems to me, the protection of the Acts by showing that the amount of the rent attributable to furniture had ceased to be substantial at the date when proceedings were taken owing to increase of rent, as in that case, or owing to diminution of furniture.

The principle as there laid down was expressly approved as a decision binding on this court in *Bowness* v. *O'Dwyer* (24). That case raised other points which might have been made the basis of the decision, but, in a considered judgment, the principle as stated in the sentence which I have cited was, as I have said. approved and applied.

The present case differs from *Jozwiak* v. *Hierowski* (25) in that here it is not a question of more or less furniture; the tenant purchased all the furniture. Such a case was considered in *Welch* v. *Nagy* (26) by Asquith, L.J., in the course of his judgment. In that case the tenant had taken a lease of certain furnished premises for a year. Towards the end of the year he bought the furniture. There was no evidence of any negotiations for any variation of the existing tenancy, apart from the change in the position brought about by the purchase. Asquith, L.J., in the course of his judgment, said: "In my view, if during the "currency of a single lease, which is originally a substantially "furnished one, the tenant buys all the furniture, the effect is "not, while that lease is still on foot, to convert the tenancy into "an unfurnished one for the purposes of the Rent Acts".

I agree with Mr. Blundell's submission that on the facts of that case a conclusion on that point was not necessary for the decision; and it is, at any rate, not clear whether the other members of the court based themselves on it. In my opinion, however, if *Jozwiak* v. *Hierowski* (27) is binding on us, what Asquith, L.J., said follows. The question as between a furnished and unfurnished letting is whether a substantial portion of the rent is attributable to furniture. If an inquiry fell to be made at the date when proceedings were brought, as *Jozwiak* v. *Hierowski* (27) decided it did not, a decision that a substantial portion of the rent was not attributable to furniture would make it an unfurnished letting, that is, in the same category as if no furniture at all had been let. It may well be that the tenant in a case such as *Welch* v. *Nagy* (28) would not think it worth while to seek to re-open the question of rent for the remaining period of his tenancy. In such a case it would be quite illogical to treat the figure arrived at on a furnished basis as the standard rent. On this point I have come to a conclusion different from that at which the county court judge arrived. I do not think that the fact that we are concerned with a weekly tenancy makes any difference. Such a tenancy, unless terminated by notice or surrender, continues as a tenancy. The decision in *Jozwiak* v. *Hierowski* (29) was based on this principle.

---

(24) [1948] 2 K. B. 219, 229.

(25) [1948] W. N. 201; 64 T. L. R. 322.

(26) [1950] 1 K. B. 455, 461.

(27) [1948] W. N. 201; 64 T. L. R. 322.

(28) [1950] 1 K. B. 455.

If these decisions are binding on us, it seems to me clear that the landlord must succeed. Mr. Blundell submits that they are inconsistent with *Brown* v. *Robins* (30) and *Seabrook* v. *Mervyn* (31). These were not cited in the cases to which I have already referred. I will consider *Seabrook* v. *Mervyn* (31) first. The letting there was originally a furnished letting. The landlord decided to remove the furniture and served a notice to quit so as to enable her to do so. It was held to be unnecessary to decide whether this was a valid notice. After that there were negotiations, some oral, some in writing. The tenant expressed a wish to stay on, bringing in her own furniture. There was evidence of oral discussion about rent, the landlord saying in her evidence it was to be the same. The court held that what had taken place amounted to a variation of the tenancy agreement in that the furniture was no longer to be included therein and the letting must be treated as unfurnished and the tenant was protected. In *Brown* v. *Robins* (32) there were again negotiations and letters. A quantity of furniture covered by the agreement which had been signed was excluded. The court may, I think, have proceeded on the basis that it must be treated as excluded ab initio, in which case the decision would not help Mr. Blundell.

It is unfortunate that *Seabrook* v. *Mervyn* (33) was not cited in *Jozwiak* v. *Hierowski* (34), but I do not think they are irreconcilable. The combined effect seems to me to be this. If there is an original furnished or unfurnished letting, variations in the furniture supplied, or in the rent, do not, in themselves, alter the character of the letting which is, prima facie, determined for the period of the tenancy at the time when the original contract of tenancy was made. If, on the other hand, there is evidence of a variation consequent on the change in the furniture position, the question of the rent, having regard to that change, being included in the negotiations, then regard is had to the position as at that date. If in *Seabrook* v. *Mervyn* (35) the landlord had agreed to a reduction of the rent because no furniture was being supplied, it would have been very artificial not to regard it as an unfurnished letting. It was said that the principle in *Jozwiak* v. *Hierowski* (36) might lead to difficulties if the tenancy started a long time ago. The rule was admittedly a rule of convenience, and with respect it seems to me to justify that description. In any case, I regard it as binding on this court.

---

(29) [1948] W. N. 201; 64 T. L. R. 322.
(30) [1943] 1 All E. R. 548.
(31) [1947] 1 All E. R. 295.
(32) [1943] 1 All E. R. 548.
(33) [1947] 1 All E. R. 295.
(34) [1948] W. N. 201; 64 T. L. R. 322.
(35) [1947] 1 All E. R. 295.

Applying the law as so laid down to the facts of this case, it seems to me that neither the purchase of the furniture, in itself, nor anything that took place during the short remainder of Cockram's tenancy, precludes the application of the principle in *Jozwiak* v. *Hierowski* (36). The actual purchase was, it seems, in the same category as that in *Welch* v. *Nagy* (37), to which Asquith, L.J., referred. The subsequent lowering of the rent to 20*s*. was not consequent on the change in the furniture position but on the tenant's inability to pay.

I will refer to one or two other points which were raised in the course of the argument to show that I have not overlooked them. The registrar considered the question whether the fact that this was a weekly tenancy made any difference. He decided that it did not, because the original tenancy was not determined by notice or surrender. I agree with this finding; nor was it, I think, challenged. Mr. Blundell's submission was that the purchase of the furniture ipso facto made the letting an unfurnished one for the purpose of applying the definition.

Mr. Megarry relied on *Artillery Mansions* v. *Macartney* (38), which concerned the question what portion of the rent was attributable to services, which are covered, as is furniture, by s. 10, sub-s. 1, of the Rent Restrictions Act of 1923. There had been an assignment, and the question was whether the "value "to the tenant" within that section was to be determined by reference to the position of the original tenant or the assignee. The court held that it was the value to the original tenant. *Jozwiak* v. *Hierowski* (39) was not referred to, but the decision seems to me to be in line with the principle there laid down.

There was a question at one stage of the argument whether Mr. Megarry had conceded that after the purchase of the furniture Cockram became entitled to the protection of the Acts. On this basis Mr. Blundell argued, as it seemed to me with force, that if there was a protected tenant there must be a standard rent. A concession by counsel could not, of course, affect the construction of the Acts. Mr. Megarry after some discussion put it in this way. He submitted that, if his argument as to standard rent succeeded, this did not necessarily imply that Cockram might not have been protected from eviction if he had held over after his tenancy had been determined. That issue can be dealt with if it ever arises. I find it difficult to see how, on the basis of Mr. Megarry's submission, Cockram could have claimed to be a protected tenant.

---

(36) [1948] W. N. 201; 64 T. L. R. 322.

(37) [1950] 1 K. B. 445.

(38) [1949] 1 K. B. 164.

(39) [1948] W. N. 201; 64 T. L. R. 322.

Mr. Blundell referred to *Prout* v. *Hunter* (40), where a flat had been let to the defendant unfurnished and sublet by her furnished. The plaintiff landlord served notice to quit on the defendant, who claimed the protection of the Acts. The tenant, as pointed out by Sargant, J., had never been an occupying tenant. It was held that the flat must be considered with reference to its actual occupation at the time when proceedings were brought as being a dwelling-house let furnished and, therefore, outside the protection of the Acts. There is a statement in the judgment of Bankes, L.J., which was relied on, that the material time to consider the status of the house is when the landlord seeks to obtain possession. That case is clearly distinguishable on its facts, but it is worth noting that in *Bowness* v. *O'Dwyer* (41) the court clearly had in mind that "the general "rule under the Acts" points to the date when the landlord seeks to enforce his rights as the date when the status is to be determined.

In my opinion, therefore, on the authorities, the house was first let within the definition of standard rent when it was let to the present tenant. The standard rent is therefore 3*l*. 10*s*., and the appeal must be allowed.

DENNING, L.J. The question for decision is, what is the standard rent of the house? Is it the 25*s*. at which it was let to Cockram? Or the 3*l*. 10*s*. at which it was let to Mrs. Stagg? This was a house which was first let after September 1, 1939. It therefore comes within the Landlord and Tenant (Rent Control) Act, 1949. Under that Act either landlord or tenant can ask the rent tribunal to determine what is a reasonable rent for Mrs. Stagg to pay for the house. Neither side has yet asked the tribunal to determine that question, because there is a prior question, which is before us today, namely, what is the standard rent, 3*l*. 10*s*. or 25*s*.? The tribunal can lower a standard rent but not raise it. If 3*l*. 10*s*. is the standard rent and is too much, the tribunal can reduce it to a reasonable rent, and that will be the standard rent. But if 25*s*. a week is the standard rent and is too little, then the tribunal cannot raise it to a reasonable amount. If 25*s*. is the standard rent, Mrs. Stagg is entitled to keep the house at that figure, no matter that it is an unreasonably

(40) [1924] 2 K. B. 736.

(41) [1948] 2 K. B. 219.

low rent; and she also is entitled to recover some 200*l*. from the landlord. So it is very vital to determine what is the standard rent.

The standard rent is the rent at which the house was "first "let". In one sense, of course, 25*s*. was the rent at which it was first let. But it has long been settled that it is not every first letting which fixes the standard rent. It must be a letting which is material for the purpose. Thus a furnished letting is not material: *Signy* v. *Abbey National Building Society* (42); nor is a business letting: *Macmillan & Co. Ld.* v. *Rees* (43); nor is the letting of a cottage which is subject to the Rural Workers Act: *Roberts* v. *Jones* (44). Those lettings must be ignored in determining the standard rent. But, on the other hand, there are many exceptional lettings which do fix the standard rent. Thus a letting made thirty years ago may fix the standard rent: *Davies* v. *Warwick* (45); so may a letting at an uneconomic rent: *Chamberlain* v. *Farr* (46); or a preferential rent: *Insall* v. *Nottingham Corporation* (47).

The difficulty in the present case is that the letting started off as a furnished letting but that, in the course of it, the tenant bought the furniture. What is the position then? The cases are difficult to reconcile, but I think that they come to this: in order to see whether a contractual letting is furnished or unfurnished for the purposes of the Rent Acts, the position must ordinarily be tested as at the time when the tenancy began. That is the time at which the court must decide whether the amount of rent fairly attributable to the use of the furniture forms a substantial portion of the whole rent. If, on applying that test, it is found that the house is let furnished at the beginning of the tenancy, it will thereafter retain the status of a furnished house throughout the tenancy, notwithstanding subsequent fluctuations in the quantity or value of the furniture or of the amount of the rent: *Jozwiak* v. *Hierowski* (48); and, conversely, if it is found to be let unfurnished at the beginning, it will ordinarily retain thereafter the status of an unfurnished house, notwithstanding subsequent fluctuations: *Bowness* v. *O'Dwyer* (49); cf. *Artillery Mansions Ld.* v. *Macartney* (50).

The rule that you are to look at the beginning of the tenancy is not, however, an absolute rule, because changes may occur which are not mere fluctuations, but are so fundamental as to reverse the character of the letting. For instance, if there is a furnished letting and, after it has started, the landlord removes the whole, or substantially the whole, of his furniture and the tenant brings in his own, it may well take on the character of an unfurnished letting so as to entitle the tenant to the protection of the Acts: *Brown* v. *Robins* (51); *Seabrook* v. *Mervyn* (52). Applying the principle of those cases, I should think that, if the tenant buys all the furniture in the house from the landlord, the letting may very well thereafter take on the character of an unfurnished letting, and the tenant will be protected by the Acts. I know that Asquith, L.J., in an obiter dictum in *Welch* v. *Nagy* (53), spoke as if it could not change its character in that way: but I cannot go all the way with him there. Suppose, for instance, in this case that the letting had continued for some years after Cockram bought the furniture, he paying 25*s.* a week all the time: I should have thought it plain that he would have become protected by the Rent Restriction Acts. Once he bought the furniture, he could have removed it the next day, or have re-sold it, or have exchanged it for other furniture, or have destroyed it, without the landlord being able to say him nay; and still he would have remained tenant of the house. It would clearly have been an unfurnished letting and he would be protected from eviction. That follows from *Seabrook* v. *Mervyn* (54), a decision of this court which is binding upon us, and with which, if I may say so, I fully agree. And if once it is conceded that in that case Cockram would have been protected from eviction, it follows inevitably that the standard rent would be 25*s.*: for if he had asserted his right to stay in the house after the contractual tenancy had come to an end, there can be no doubt that he would only have had to pay 25*s.* a week. There would indeed be no other figure which could be suggested to be the standard rent.

---

(42) [1944] 1 K. B. 449.
(43) (1946) 62 T. L. R. 331.
(44) [1947] K. B. 221.
(45) [1943] K. B. 329.
(46) (1942) 112 L. J. K. B. 206.
(47) [1949] 1 K. B. 261.
(48) [1948] W. N. 201; 64 T. L. R. 322.
(49) [1948] 2 K. B. 219.
(50) [1949] 1 K. B. 164.

In this particular case, however, I cannot regard the purchase of the furniture by Cockram as having so fundamental an effect as to change the character of the letting. It is not as if he stayed on for any length of time after buying the furniture. He only stayed on a few weeks, and he had not fully paid for the furniture when he left. He was still paying the weekly instalments of 5*s.* for it. He started by paying 25*s.* a week for the house furnished, and he ended by paying 25*s.* a week for it with the same furniture still there. The furniture had become his, no doubt, but it was not fully paid for; and I cannot help thinking that the letting retained the same character throughout. It was simply a case of giving a man a roof over his head for a short time after he was bombed out, and of letting him have furniture to use, because he had lost all his own; and he only paid what he could afford. The letting started off as a furnished letting, and there was no such fundamental change as to reverse the character of it. The rent of 25*s*. was rent fixed for a furnished letting, and it never lost that character. It was therefore not the standard rent. Once the 25*s*. is discarded as immaterial, it follows that the standard rent is 3*l*. 10*s*., for that was clearly material. I therefore agree that the appeal should be allowed.

---

(51) [1943] 1 All E. R. 548.
(52) [1947] 1 All E. R. 295.
(53) [1950] 1 K. B. 461.
(54) [1947] 1 All E. R. 295

BIRKETT, L.J. The question for determination in this case is what is the standard rent of the house situate at 147 Kew Road, Richmond? There is a surprising difference between the two figures for which the opposing parties contend, the tenant submitting that the figure should be 25*s*. per week, while the landlord submits the figure of 3*l*. 10*s*. a week. The county court judge, reversing the decision of the registrar of the Wandsworth County Court, has decided that the sum should be 25*s*. per week, and against that decision the landlord appeals. This great disparity is not without importance in considering the very unusual facts of the case; for most unusual they are. [His Lordship recited the facts and continued:] The fact that the landlord was moved by considerations of sympathy or kindness when letting the furnished premises to Cockram, or when he sold the furniture to him and left the rent unaltered, or reduced it to 20*s*. a week, is irrelevant for the decision what is the standard rent, on the authority of *Insall* v. *Nottingham Corporation* (55). And equally, of course, if this was a furnished letting to Cockram originally, and thereafter it never changed its essential character, that letting can be disregarded too, on the authority of *Signy* v. *Abbey National Building Society* (56). There is no doubt that the original letting to Cockram was the letting of furnished premises, and the time of the original contract of tenancy is the material time to consider. The real question before us is whether the sale of the furniture to Cockram in the course of the tenancy, in February, 1941, alters the tenancy from a furnished tenancy to an unfurnished tenancy for the purpose of fixing the standard rent. At first sight, it seems a natural and a logical thing to say that if you have an original furnished letting, and then a purchase of the whole of the furniture, and a continuance of the tenancy, the tenancy is at once transformed from a furnished letting to an unfurnished letting from the date of the purchase; and if this unfurnished letting is the first letting after the appropriate date, then the amount of the rent must be taken to be the standard rent. But I do not think the matter can be disposed of as simply as this, in view of the cases decided in this court. *Jozwiak*

---

(55) [1949] 1 K. B. 261.

(56) [1944] K. B. 449.

v. *Hierowski* (57) decides that, if the letting was originally a furnished letting, subsequent variations in the quantity or value of the furniture will not necessarily alter the essential character of the letting.

But it seems to be equally clear from *Seabrook* v. *Mervyn* (58) that if the essential character of the letting is changed (and this, it would seem, must be decided on the facts of the particular case), a letting, which at the beginning of the letting was a furnished letting, may become an unfurnished letting for the purposes of the Acts. The principle underlying *Jozwiak* v. *Hierowski* (59) was followed in *Welch* v. *Nagy* (60), and it was there held that, although, in the course of a tenancy which was originally a furnished tenancy, the tenant actually bought the furniture, nevertheless, on the whole of the facts of the case, the furnished tenancy was not converted into an unfurnished one. The authorities would seem to combine to say that the exact facts of each case must be considered before deciding whether any such essential change has taken place. Looking at the undisputed facts of this case, at the date of the beginning of the tenancy it was a furnished letting; mere variation in the quantity or value of the furniture would not be enough to change its essential character; and I do not think that the purchase of the furniture in this case, with its very special and peculiar circumstances, changed the essential character of the tenancy; and the original character was retained throughout the short tenancy of Cockram. In this connexion, it is not unimportant to observe that, when the change in the ownership of the furniture occurred, there does not seem to have been any thought of changing the amount of the rent payable, or of making any change whatever, and the reduction of the rent by 5*s*. 0*d*. a week was not made consequent on the change itself, but was merely a concession to the poverty of Mr. Cockram.

It follows from all this that, in my view, the first unfurnished letting was the letting to Mrs. Stagg in June of 1941 at the weekly rent of 3*l*. 10*s*. 0*d*. per week. For these reasons, I am of opinion that the learned county court judge came to a wrong conclusion, understandable enough in the face of decisions which might seem, at first sight, to be irreconcilable, and the appeal must be allowed.

Appeal allowed.

Solicitors: *Dixon, Ward & Co.; Piesse & Sons, for Abbot, Sturgess & Co., Richmond.*

A. W. G.

---

(57) [1948] W. N. 201; 64 T. L. R. 322.

(58) [1947] 1 All E. R. 295.

(59) [1948] W. N. 201; 64 T. L. R. 322.

(60) [1950] 1 K. B. 455.

1950
Nov. 29;
Dec. 6.

Hilbery, J.

DALEY *v.* DIGGERS LD., AND OTHERS.

[1950 D. 144.]

Costs—Legal aid—Order in favour of assisted plaintiff—Principle applicable—Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *s.* 1, *sub-s.* 7 (*b*); *s.* 2, *sub-s.* 2; *s.* 6, *sub-ss.* 5, 6 *and* 9.

An assisted person under the Legal Aid and Advice Act, 1949, brought an action against two defendants, succeeding against one and failing against the other. On the question of costs:—

Held, (1.) that, notwithstanding that party-and-party costs are awarded as an indemnity and the assisted person incurs no liability and the legal aid fund no more than a limited liability in respect of his costs, on the true construction of the Act, the fact that the successful litigant is an assisted person is to be disregarded by the court when exercising its discretion as to costs, and the plaintiff, accordingly, was entitled as against the unsuccessful defendants to the ordinary award of party-and-party costs; (2.) that, although the successful defendants could only have recovered from the plaintiff a certain proportion of their costs if the plaintiff had been ordered to pay them, the court could follow the common procedure and make an order on the unsuccessful defendants to pay those costs in full.

ACTION.

On November 14, 1950, at Chelmsford, Hilbery, J., gave judgment for the plaintiff, Patrick Daley, against the first defendants, Diggers Ld., and gave judgment for the second defendants against the plaintiff.

The plaintiff had from January 18, 1950, the date on which the writ was issued, until October 11, 1950, been a self-supporting litigant; but, on the latter date, he was granted a certificate under the Legal Aid and Advice Act, 1949. The question what order for costs should be made in favour of the plaintiff and the successful defendants in view of the provisions of that Act (1) was reserved for argument in London, and the case is reported on that point only.

---

(1) Legal Aid and Advice Act, 1949, s. 1, sub-s. 7: "Save as expressly provided by this Part of "this Act or by regulations made "thereunder,— . . . (*b*) the rights "conferred by this Part of this Act "on a person receiving legal aid shall "not affect the rights or liabilities "of other parties to the proceedings "or the principles on which the "discretion of any court or tribunal "is normally exercised".

Section 2, sub-s. 2: "Where a "person receives legal aid in connexion with any proceedings— . . . "(*e*) his liability by virtue of an order "for costs made against him with "respect to the proceedings shall not "exceed the amount (if any) which is "a reasonable one for him to pay "having regard to all the circumstances, including the means of all "the parties and their conduct in connexion with the dispute".

W. M. F. Hudson for the plaintiff.

Boileau for the first defendants.

Montague Berryman, K.C., and *H. Tudor Evans* for the second defendants.

Cur. adv. vult.

Dec. 6. HILBERY, J. The unsuccessful defendants submitted that the plaintiff should either have no costs from and after the date when he became an assisted person under the Act, or alternatively, that he should only have 85 per cent. of his costs from and after that date. There is no doubt about the principle upon which in the past the courts of common law have awarded costs to a successful litigant. They have been awarded as being " as or in the character of an indemnity ". In the words of Bramwell, B., in *Harold* v. *Smith* (2): " Costs as between party and " party are given by the law as an indemnity to the person " entitled to them: they are not imposed as a punishment on " the party who pays them, nor given as a bonus to the party " who receives them ". Those words were quoted with approval in the Court of Appeal by Lord Cozens-Hardy, M.R., in *Gundry* v. *Sainsbury* (3), when he said of costs: " They are not a com- " plete idemnity, but they are only given in the character of an " indemnity ".

As an assisted person under the Legal Aid and Advice Act, 1949, the plaintiff has not been liable personally for costs, and therefore, it is argued, cannot be granted something in the character of an indemnity against a liability which he has not incurred. As a matter of principle, and apart from statute, this contention would seem well founded. As an assisted person the plaintiff has not been under any personal liability for his costs incurred in establishing his claim against the defendants, and, the court being apprised of the fact, he can have no claim to an award of costs, since such an award would issue on the basis of its being an indemnity to him against a liability which in fact has never been for him an existent liability.

It is necessary therefore to examine the Act to see what express provisions are made in it about costs and, if possible, to discover the intention of the Act with regard to costs where the assisted person succeeds in his claim and also where he fails. By s. 1, sub-s. 7 (*b*), of the Act: " Save as expressly provided " by this Part of this Act or by regulations made thereunder,— " . . . (*b*) the rights conferred by this Part of this Act on a " person receiving legal aid shall not affect the rights or liabilities " of other parties to the proceedings or the principles on " which the discretion of any court or tribunal is normally

---

(2) (1860) 5 H. & N. 381, 385.

(3) [1910] 1 K. B. 645, 649.

1950

DALEY
v.
DIGGERS
LD.

Hilbery, J.

"exercised". The fact therefore that the plaintiff is receiving the legal aid conferred by that part of the Act, in the first place, is not to affect the liability of the other parties to the proceedings, i.e., the liability of a defendant, or in the second place the principles on which the discretion of the court is exercised. Costs are in the discretion of the court and become a liability of a party to the suit only after the court in the exercise of its discretion has awarded them. The second part of the sub-section does therefore directly apply to the question of costs to be awarded, either to or against an assisted person. If the discretion to award them should normally be exercised in a particular case so as to make the defendant liable for them, then they become a liability of a party to the proceedings other than the assisted person, and the first part of the sub-section comes into operation.

Since the second part of the sub-section, after the disjunctive, expressly provides that the principles on which the discretion of the court is to be exercised, that is to say in matters of discretion, are not to be affected by the fact that a party is a legally assisted person, the intention of the section would seem to be that when it comes to the exercise of the discretion over costs the court should not allow itself to be affected by the fact that the plaintiff is an assisted person.

Thus construed, the section is in harmony with other provisions of the Act. For example, the Act seems to contemplate that the court in some cases will make orders for the payment of costs against an assisted plaintiff, and might make them for the full amount of the defendant's costs in the exercise of the court's discretion if it were left to act on the ordinary principles, unless the Act expressly provided otherwise. To limit the assisted plaintiff's liability for the successful defendant's costs to something below that which the court exercising its discretion on ordinary principles might order him to pay, the Act therefore expressly provides by s. 2, sub-s. 2 (*e*), that "his "liability by virtue of an order for costs made against him with "respect to the proceedings shall not exceed the amount (if "any) which is a reasonable one for him to pay having regard "to all the circumstances, including the means of all the parties "and their conduct in connexion with the dispute"; and by reg. 17 of the Legal Aid (General) Regulations, 1950, it is provided: "(1.) Where an order for costs is made against an "assisted person, then, subject to the provisions of the next "following paragraph of this Regulation—(*a*) the determination "of the amount of his liability for costs in accordance with s. 2, "sub-s. 2 (*e*), of the Act shall, save as is hereinafter provided, "be made at the trial or hearing of the action, cause or matter "and be final; (*b*) in determining the amount of the assisted "person's liability, his dwelling-house and household furniture "and the tools and implements of his trade shall be left out of "account to the like extent as they are left out of account in "the determination by the Board of his disposable income and "disposable capital; (*c*) in determining the amount of the "assisted person's liability, any certificate, emergency certificate, "notice or affidavit which may have been filed under the provisions of reg. 15 shall be evidence of the facts stated therein".

At the same time the Act seems to contemplate that orders will be made for the payment of the full costs of an assisted person who succeeds, just as if he were an ordinary litigant, and s. 6, sub-ss. 5 and 6, provide as follows—sub-s. 5: "Subject to "this Part of this Act, a solicitor who has acted for a person "receiving legal aid shall be paid for so acting out of the legal "aid fund, and any fees paid to counsel for so acting shall also "be paid out of that fund. 6. The sums payable under the last "foregoing subsection to a solicitor or counsel shall not exceed "those allowed under the Third Schedule to this Act".

Now, the sums payable out of the fund to the solicitor and counsel according to Sched. III where the proceedings (other than matrimonial suits) are in the Supreme Court or the House of Lords are only 85 per cent. of counsel's fees and 85 per cent. of the solicitor's profit costs and the full amount of his disbursements, and s. 6, sub-s. 9, provides: "Nothing in this section "shall prejudice para. (*b*) of sub-s. 7 of s. 1 of this Act, "and in particular—(*a*) sub-ss. 6 and 7 of this section shall not "affect the sums recoverable by virtue of an order for costs made "in favour of a person who has received legal aid or of an agreement for costs so made which provides for taxation; and (*b*) "for the purpose of any such order or agreement, the solicitor who "acted for the person in whose favour it is made shall be treated "as having paid any counsel's fees".

Section 6, sub-s. 9, expressly referring as it does to sub-s. 7 (*b*) and to s. 6, sub-ss. 6 and 7, is in terms saying that although in litigation in the Supreme Court a solicitor for an assisted person will only have a right to 85 per cent. of his profit costs and his counsel will only have a right to 85 per cent. of his fees, none the less the court is to disregard this fact when exercising its discretion to award costs to the successful assisted-person-litigant and exercise that discretion on ordinary principles.

If the true construction of s. 1, sub-s. 7 (*b*) were that the court should exercise its discretion on the ordinary common law principle when deciding whether or not to award costs to a successful assisted litigant and therefore would award nothing because that assisted litigant had been under no liability for his own costs, there would have been no need for s. 6, sub-s. 9. There would be no question about whether the plaintiff should be awarded more than 85 per cent. since such a successful assisted litigant would not be awarded costs at all. Furthermore it is noticeable that s. 2, sub-s. 2 (*d*), enacts that: " Where a " person receives legal aid in connexion with any proceedings— " . . . (*d*) any sums recovered by virtue of an order . . . for costs " made in his favour with respect to the proceedings shall be " paid to the legal aid fund "; and by s. 3, sub-s. 7: " References " in this section to the net liability of the legal aid fund on any " person's account in relation to any proceedings refer to the " aggregate amount of the sums paid or payable out of that fund " on his account in respect of those proceedings to any solicitor " or counsel and not recouped to that fund by sums which are " recovered by virtue of an order or agreement for costs made " in his favour with respect to those proceedings ".

The last part of this sub-section obviously envisages an award of costs to a successful litigant. That is not consistent with a construction of s. 1, sub-s. 7 (*b*), which would result in the court denying an order for costs to a successful assisted litigant because he was an assisted person and had therefore been under no liability himself for costs.

These provisions in the Act to which I have called attention lend support to the construction which I have put upon s. 1, sub-s. 7 (*b*), namely, that in considering whether in the exercise of its discretion the court should award costs to the successful assisted person, the court should altogether disregard the fact that the successful plaintiff is an assisted person under the Act.

The alternative contention, that the costs to be awarded to the plaintiff as an assisted litigant should be limited to the 85 per cent. of the solicitor's profit costs and 85 per cent. of the fees to counsel for which alone the legal aid fund has undertaken liability, in my opinion is covered by what I have already decided is the proper construction of s. 1, sub-s. 7 (*b*).

I therefore enter judgment for the plaintiff against the first defendants for 500*l*. and costs; and I enter judgment for the second defendants against the plaintiff.

As there was uncontradicted evidence before me that the first defendants suggested to the plaintiff that he should sue the second defendants, because the first defendants, it was said, were not financially strong at that time, I cannot say that it was not reasonable for the plaintiff to join them in this action, though it is true that as against each a completely different cause of action in tort was alleged and relied on. For many years past in such circumstances the court has ordered the costs of the successful defendant to be paid direct by the unsuccessful defendant instead of ordering those costs to be paid by the plaintiff and added to the amount of his damages recovered against the unsuccessful defendant.

1950

Daley v. Diggers Ld.

Hilbery, J.

Since I am of opinion that the joinder in this case was reasonable, and since in those circumstances according to the established present-day practice the court makes the costs of the successful defendant the responsibility of the unsuccessful defendant and not of the plaintiff, I make that order in this case: I order the costs of the second defendants to be paid direct to them by the first defendants. As I make the order for these costs against the first defendants and that order connotes that he is the party responsible for them, reg. 17, which would require me to hold an inquiry into the plaintiff's means if I were making an order for costs against him, does not apply. I am not making an order for costs against him but against the first defendants. This may seem artificial; it is. But so is and always has been the order for one defendant to pay another defendant's costs where two defendants have been joined in the action, and the plaintiff has succeeded against one and failed against the other.

Judgment accordingly.

Solicitors: *Bell, Brodrick & Gray for Turner, Martin & Symes, Ipswich; E. P. Rugg & Co.; Fred Hollis.*

S. C.

C. A.

1950
Dec. 6, 7.

Evershed, M.R., Singleton, L.J., and Danckwerts, J.

LANGDON *v.* HORTON AND ANOTHER.

[Plaint No. F. 531.]

Landlord and tenant — Death of statutory tenant — First cousins resident with tenant for many years—Claim to succeed to tenancy as members "of the tenant's family"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*g*)*—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1935 (25 *Geo.* 5, *c.* 13), *s.* 1.

The plaintiff was the owner of a house originally let by her to a tenant who afterwards became a statutory tenant under the Rent Restriction Acts. The tenant lived with her husband in the house till he died in or about 1920. There were no children of the marriage, and, after her husband's death, the tenant invited the defendants, two of her first cousins, to live with her. They did so until the tenant died on May 29, 1950. The plaintiff brought proceedings in the county court to recover possession of the house from the defendants, but they contended that they were tenants as being members of the tenant's family within s. 12, sub-s. 1 (*g*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

Held, that the defendants were not members of the tenant's family within sub-s. 1 (*g*), for the fact that they and the tenant were all members of the same family, and therefore blood relations, was not of itself sufficient to support the defendants' claim to be members of the tenant's family by consanguinity which was in this case the only relevant consideration.

Brock v. *Wollams* [1949] 2 K. B. 388, and *Gammans* v. *Ekins* [1950] 2 K. B. 328, applied. *Jones* v. *Whitehill* [1950] 2 K. B. 204, distinguished.

APPEAL from Judge Archer, K.C., sitting at Hastings county court.

The plaintiff was the owner of 33 Alma Villas, St. Leonards-on-Sea, which was occupied by Mrs. Mary Prior, a widow, as a statutory tenant. She had no children. The tenant was originally a contractual tenant and lived in the house with her husband, who had died some thirty years previously. On her husband's death the tenant invited two of her first cousins, the two defendants, Miss Horton and Mrs. Selby, who were sisters, to live with her on a sharing basis. They accordingly lived with her for some twenty-nine years, till her death on May 29, 1950. They were then all between seventy and eighty years of age.

The plaintiff then brought proceedings against the defendants for possession of the property, but they claimed the protection of the Rent Restriction Acts on the ground that they were members of the late tenant's family within s. 12, sub-s. 1 (*g*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

The county court judge made an order for possession within six months, holding that the two defendants were not members of the family of the tenant within s. 12, sub-s. 1 (*g*), of the Act. The defendants appealed.

Neil Lawson for the defendants. The question is whether first cousins of a statutory tenant are members of his family within s. 12, sub-s. 1 (*g*), of the Rent Restriction Act of 1920 (1). This is a mixed question of law and fact. The county court judge must first direct himself as to the meaning of "family" in the sub-section—that is a question of law—and then consider whether the persons in question fall within that term—a question of fact. The meaning of the term "family" has been frequently considered. In *Price* v. *Gould* (2) it was held that brothers and sisters were members of the tenant's family, and in *Brock* v. *Wollams* (3) an adopted daughter was held to be a member of his family. The test to be applied is that laid down by Cohen, L.J., in *Brock* v. *Wollams* (4), that is to say, whether an ordinary man, if asked whether the person in question was a member of the family, would say that he was. That test falls to be applied to two different classes of case: first, that where the relationship does not depend on a blood relationship, and secondly, where it does so depend. In the latter case it is necessary to decide how remote the relationship may be. The relationship of first cousins is so close that it seems unnecessary to take into consideration the circumstances in order to decide whether they are members of the tenant's family.

---

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1, as amended by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935, s. 1 provides:—"For the purposes of this "Act except where the context other- "wise requires:— . . . (*g*) . . . the "expression tenant includes the "widow of a tenant who was "residing with him at the time of "his death or, where a tenant leaves "no widow or is a woman, such "member of the tenant's family so "residing as aforesaid as may be "decided in default of agreement by "the county court".

When, however, all the circumstances of this case are taken into account, these defendants clearly fall within the term family as it is used in s. 12, sub-s. 1 (*g*). The relationship of first cousins is as close as that of uncle and niece. If a family consists of persons who are related to each other by blood, it follows that first cousins are members of the tenant's family. The authorities show that in the Act the expression "tenant's "family" is not limited to the tenant's descendants. If that is right, the expression includes all persons related by blood to the tenant who are accordingly entitled to the benefit of the section. The ordinary man, if asked, would say that these first cousins were members of the tenant's family. [He referred to *Standingford* v. *Probert* (5); *Jones* v. *Whitehill* (6), and *Gammans* v. *Ekins* (7).]

The classes laid down by Asquith, L.J., in *Gammans* v. *Ekins* (8) are too narrow. Consanguinity must be given a wide meaning which should suffice in itself to determine that first cousins are members of a tenant's family. This is the more so in a case like this where the cousins have lived with the tenant for twenty-nine years before her death. *Jones* v. *Whitehill* (9) shows how wide a meaning can be given to the words "member "of a tenant's family". It must be remembered that if it seems that an excessively wide meaning may be given on this view to the words, the effect will always be cut down by the need for residence with the tenant.

L. A. Blundell, for the plaintiff, was not called on to argue.

---

(2) (1930) 143 L. T. 333; 46 T. L. R. 411.

(3) [1949] 2 K. B. 388.

(4) Ibid. 395.

(5) [1950] 1 K. B. 377.

(6) [1950] 2 K. B. 204.

(7) [1950] 2 K. B. 328.

(8) [1950] 2 K. B. 328, 331.

(9) [1950] 2 K. B. 204.

EVERSHED, M.R. [after stating the facts]. Having regard to the facts, I think that Mr. Lawson was entitled to make the point that undoubtedly this house had been for close upon a generation the home of these two women, and that it would be in accordance with the general policy of the Act to protect them in their occupation. But the question is whether they can qualify for that protection. They can only do so if it can be fairly said of them that they are members of the tenant's family within the meaning of s. 12, sub-s. 1 (*g*), of the Act of 1920. This depends on the meaning of "the tenant's family", a question which has been already on three or four occasions before this court.

It is unnecessary to repeat, as has been already laid down, that the word "family" is used here, to borrow the words used of the soldier in King Henry V, in a sense "base, common, and "popular". It is further established that the right approach is to consider whether the facts suffice to secure an affirmative answer to the question when put in ordinary conversation by an ordinary man: "Were these women at the tenant's death "members of her family?" Observe that it is not sufficient to say that they and the tenant were all members of the same family. The question, I repeat, is: were these women members of the tenant's family?

Singleton, L.J., pointed out early in the argument that the fact that for very many years they had resided together cannot itself add very much in this case, for under sub-s. 1 (*g*) residence constitutes a separate qualification. No doubt, as Mr. Lawson pointed out, the residence qualification has a limiting effect which would prevent the more extravagant result otherwise liable to flow from his submission on construction. The question that arises here, as originally formulated in *Brock* v. *Wollams* (10), may arise in two distinct and rather different classes of case. The first is where the only really relevant consideration is that of blood relationship or consanguinity. The second is where, apart from or in addition to consanguinity (if any), there are special circumstances which require in that context an affirmative answer to the material question.

A case which was before this court this year is an illustration of the second class: *Jones* v. *Whitehill* (11). The claimant there was a niece by marriage of the statutory tenant, but she had by her conduct assumed, as it were, a filial character. I think it was in the light of those facts that this court concluded that she did come within sub-s. 1 (*g*). It may be that certain passages in my judgment have suggested a wider view of construction of the paragraph than is justified. That judgment should be read

(10) [1949] 2 K. B. 388.

(11) [1950] 2 K. B. 204.

as meaning that I was not expressing any view on the general question whether nephews and nieces as such were within the compass of the formula.

Another example of the second class of case which has been before this court is that of an adopted child. An adopted child is clothed with all the characteristics of a child so far as the outside world is concerned, though it has no connexion in blood with the adopting parents.

This case is of the first class, however, and I think that it must be determined by considering whether first cousins of the same generation, as these two defendants were, of the statutory tenant, can be within the intendment of the phrase "the tenant's "family". The matter is, perhaps, largely one of first impression. The court is, after all, assuming an ordinary context and suggesting what the answer to the question posed should be. When this is done, I think that the judge came to the right conclusion, for if the consanguinity test were treated as satisfied in this case, it would extend it to relations of every degree, and, indeed, would mean that we were substituting for the word "family" in the paragraph the word "relations". In my view therefore the judge rightly answered the question.

One further observation: in one or two of the earlier cases the suggestion was made that the question whether a person was a member of the tenant's family was, after all, a question of fact. I am not saying whether in this case or in other cases it is a question of fact. I think that there is much to be said for the view that it is a matter of the construction of para. (*g*). On the other hand, where, as here, a county court judge has plainly put to himself the right question, and the answer to be given is that which an ordinary man would give to a question put in ordinary conversation, this court should be a little slow to reverse him. If it is the policy of the Act to protect persons in the occupation of their homes, I think it is also, in general, the policy of the Act to leave for the determination of the county court the numerous difficult problems requiring (as has been said in connexion with the word "reasonable") the application of a broad, common-sense, man-of-the-world view.

On these grounds, therefore, I should be slow myself to differ on a matter of this kind from the judge's conclusion. However that may be, in this case I am of the opinion that the judge came to a right conclusion. Although one cannot help feeling sympathy for the situation of these two elderly women, I think that this appeal must be dismissed.

SINGLETON, L.J. One can well understand the anxiety of these two sisters at the thought of being turned out of a house in which they have lived so long. None the less, unless they are entitled to the protection of the Rent Restriction Acts there is no answer to the claim for possession. If the tenant of a house is a woman, " the expression ' tenant ' includes a member of the " tenant's family residing with her at the time of her death ". It is claimed on behalf of the defendants that they were members of the tenant's family; that they were residing with her at the time of her death; and that consequently they are entitled to the protection of the Acts. It is agreed that they were living with her at the time of her death; and thus the only question is whether they were members of her family. Let it be noted that the question is not whether all three were members of the same family, but whether the two sisters were members of the tenant's family. Prima facie, I should not have regarded a cousin as a member of the family of another cousin. Yet decisions of this court provided Mr. Lawson with material for argument, and he has made good use of it.

In *Jones* v. *Whitehill* (12), the defendant, Mrs. Whitehill, out of love and kindness went to live with her aunt and her aunt's husband. The aunt died about eighteen months later, and the aunt's husband after another five months. The husband had been tenant of the house, and the court held that the defendant was a member of the tenant's family having regard to the fact that she went out of love and kindness to live with the tenant and his wife to look after them in their declining years. At first sight it is not easy to see how Mrs. Whitehill became a member of the family of the tenant, in whose house she lived for less than two years before he died, and to whom she was not related by blood. It may be said that that decision is in accord with the test laid down by Cohen, L.J., in *Brock* v. *Wollams* (13): would an ordinary man, addressing his mind to the question whether the defendant was a member of the tenant's family, answer " Yes "? Cohen, L.J.'s test seems to me apt to cover the case of a young relative, not born a member of the tenant's family, who is looked after from youth upwards by the tenant. Such a person may well be regarded as a member of the family. The position is by no means the same if two middle-aged women decide to live together, or if one accepts an invitation to live in the house of the other and they remain together for many years. In such a case I do not imagine that the ordinary man would regard the one as a member of the family of the other even if they were cousins.

Mr. Lawson in the course of his argument said that the first question was whether there was a relationship by blood or by marriage, and, if so, and if the one were living with the other, whether an ordinary man, addressing his mind to the present

(12) [1950] 2 K. B. 204.

(13) [1949] 2 K. B. 388, 395.

question, would answer that the defendants were members of the tenant's family. Mr. Lawson in that regard is adopting the test of relationship rather than the test laid down by Parliament. He was bound to admit that, if for this purpose cousins could be regarded as members of the tenant's family, so also must half-cousins be, or cousins twice removed; and, indeed, his argument went further: for if the relationship test, as he put it, were to be applied, cousins many times removed would have to be considered. That is not, I think, in accordance with s. 12 of the Act of 1920.

Asquith, L.J., in *Gammans* v. *Ekins* (14), said: "Mr. "Blundell, I think, was right in saying that the material "decisions limit membership of the same 'family' to three "relationships: first, that of children; secondly, those constituted "by way of legitimate marriage, like that between a husband "and wife; and thirdly, relationships whereby one person "becomes in loco parentis to another. Beyond that point the "law has not gone". Respectfully, I agree. Mr. Lawson submitted that this was too narrow a view; he said that those three classes mentioned by the Lord Justice would not include brother and sister. I think that they do: the relationship "first, that of "children" would apply to them as children of the same parents. It seems to me that in the present case the question to be asked is, whether the two sisters were members of their cousin's family. If they were not, they did not become so by living in her house for twenty-nine years. I do not see that it is possible to say that a cousin is a member of another cousin's family merely because she is a cousin. They are members of the same family or stock in the sense that they have the same maternal grandparents; that is all. The mere fact of cousinship does not make every cousin a member of another cousin's family. The fact that the defendants were residing with the tenant does provide for one limb of s. 12, sub-s. 1 (*g*), of the Act of 1920, but it cannot be said that they were members of her family even though they lived in the same house for many years. I agree that the appeal must be dismissed.

DANCKWERTS, J. I am of the same opinion. In *Brock* v. *Wollams* (15), Cohen, L.J., suggested that the meaning to be given to the word "family" in s. 12, sub-s. 1 (*g*), of the Act of 1920, should be its popular meaning. That test has been approved in several decisions of this court, and it seems to me desirable that the application of that meaning should be maintained. How does that apply in the present case?

(14) [1950] 2 K. B. 328, 331.

(15) [1949] 2 K. B. 388.

There were three persons in this case living together who were of the same sex, of the same generation, and of approximately the same age. It seems to me that their consanguinity was not the decisive test. They were living together more for reasons of convenience, in which respect this case resembles the case which was referred to by Asquith, L.J., in *Gammans* v. *Ekins* (16), when he referred to the case of two old cronies or friends sharing a residence for purposes of convenience. In my view, applying the ordinary meaning of the word "family", the present case is no more covered than the case to which Asquith, L.J., referred. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co., for Herington, Willings & Penry-Davey, Hastings; Thomas Eggar & Son, for Young, Coles & Langdon, Hastings.*

H. C. G.

(16) [1950] 2 K. B. 328.

In re WHITEHOUSE.

1951
Jan. 23.

Lord Goddard, C.J., Humphreys and Devlin, JJ.

Criminal law—Bail—Conviction by court of summary jurisdiction—Committal in custody to quarter sessions for sentence—Appeal against conviction—Jurisdiction of High Court to admit to bail—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 29, *sub-s.* 1, *and s.* 37, *sub-s.* 1 (*a*).

Notwithstanding s. 29, sub-s. 1, of the Criminal Justice Act, 1948, whereby justices, when sending a person convicted before them of an indictable offence to quarter sessions for sentence, must commit him in custody and therefore have no power to admit him to bail, nevertheless, if such a person has appealed against his conviction, then the High Court, by virtue of s. 37, sub-s. 1, has power to admit him to bail pending the hearing of his appeal.

APPLICATION for bail.

On January 9, 1951, the applicant was convicted by a court of summary jurisdiction at Liverpool of feloniously receiving, on or about November 25, 1950, a postman's uniform, the property of the Postmaster-General, knowing it to have been stolen. The

[Reported by MRS. F. N. BUCHER, Barrister-at-Law.]

court, having obtained information as to the character and antecedents of the applicant, committed him in custody to be sentenced by the next quarter sessions at Liverpool, in accordance with s. 29, sub-s. 1, of the Criminal Justice Act, 1948 (1). On January 10, 1951, the applicant by his solicitor served notice of appeal against his conviction, and applied to the High Court under s. 37, sub-s. 1, of the same Act (1), to be admitted to bail pending the hearing of his appeal.

On January 18, 1951, the application came before a judge in chambers, who referred it to the Divisional Court.

G. R. F. Morris for the applicant. It is conceded that there is no inherent jurisdiction in the High Court to grant bail in the circumstances which obtained here. Further, the justices of petty sessions cannot, by the terms of s. 29, sub-s. 1, of the Criminal Justice Act, 1948, entertain an application for bail from a person convicted by them and committed to quarter sessions for sentence. But s. 37 is intended to enlarge the power of the High Court to grant bail beyond such powers as it previously had by statute. Moreover, the power conferred by s. 37, sub-s. 1 (*a*), being in general terms, and not subject to any words of limitation, cannot be construed so as to exclude power to grant bail in respect of persons convicted but not sentenced, provided that a notice of appeal has been given against the conviction.

[Counsel referred to *Ex parte Blyth* (2); *In re Lyttleton* (3); *Rex* v. *South Greenhoe Justices, Ex parte Director of Public Prosecutions* (4); and *Rex* v. *Faithful* (5).]

Glyn Burrell for the respondents, the Post Office.

LORD GODDARD, C.J. This matter, which has been referred to the court by the judge in chambers with a view to a decision being given in public, raises a question of considerable importtance. By s. 29, sub-s. 1, one of the new provisions in the

---

(1) Criminal Justice Act, 1948, s. 29, sub-s. 1: "Where . . . a person ". . . is tried summarily by a court "of summary jurisdiction for an "indictable offence, and is convicted "by that court of that offence, then "if, on obtaining information as to "his character and antecedents, the "court is of opinion that they are "such that greater punishment should "be inflicted in respect of the offence "than that court has power to inflict, "the court may . . . commit him in "custody to quarter sessions for "sentence . . .".

Section 37, sub-s. 1: "Without pre-"judice to the powers vested before "the commencement of this Act in "any court to admit or direct the ad-"mission of a person to bail—(*a*) the "High Court may release from cus-"tody a person who has given notice "of appeal to a court of quarter ses-"sions against a conviction or sentence "of a court of summary jurisdiction, "on his entering into a recognizance "conditioned for his appearance at "the hearing of the appeal".

(2) [1944] K. B. 532.

(3) [1945] W. N. 24.

(4) (1950) 66 T. L. R. (Pt. 2) 452.

(5) 66 T. L. R. (Pt. 2) 1044.

Criminal Justice Act, 1948, a person convicted by a court of summary jurisdiction may be sent forward for sentence to quarter sessions if the justices, after conviction, obtain information as to his character and antecedents and then form the opinion "that "they are such that greater punishment should be inflicted in "respect of the offence than that court has power to inflict". The committal is to be of the prisoner in custody to quarter sessions for sentence, "in accordance with the following pro-"visions of this section"—which provisions do not matter for this purpose.

It is abundantly clear, therefore, that, where justices think fit to exercise their powers under s. 29, they have no power to grant bail. But it is argued for the applicant that the High Court has power to grant bail because of s. 37, sub-s. 1 (*a*). Contrary to the opinion which I formed earlier, but did not express, I think that the argument of Mr. Morris, for the applicant, is right. [His Lordship read s. 37, sub-s. 1, and continued:—] Those words are very wide and give power to the High Court to release from custody a person who has given notice of appeal against conviction. What impresses me is that, even before that sub-section was passed, a person who had been convicted and sentenced by a court of summary jurisdiction could serve notice of appeal and apply for bail under s. 31 of the Summary Jurisdiction Act, 1879, as amended by s. 1 of the Summary Jurisdiction (Appeals) Act, 1933, which provides expressly that, once notice of appeal has been given and the appellant has entered into a recognizance, with or without sureties, conditioned to prosecute his appeal, the justices can release him on bail if they see fit. There is no doubt that if justices refuse to admit a man to bail he can always appeal to this court. Therefore it looks as if the one case in which it has been necessary expressly to confer power on the High Court to release from custody a person who has given notice of appeal against a conviction is the case where he has been committed for sentence under s. 29 of the Act of 1948, in which case the justices have no power to grant bail. But, on the words of s. 37, sub-s. 1, it appears to me that the High Court has power to entertain an application for bail by a person sent forward for sentence, but who has appealed to quarter sessions against his conviction.

It is obviously a power which ought to be exercised with extreme care, and only in really exceptional cases. For when Parliament has provided that a man is to be committed in custody to quarter sessions for sentence, it certainly is very curious that it has apparently in s. 37, sub-s. 1, given this power to release him from custody, but has not in that sub-section made any reference to s. 29. But the words of s. 37, sub-s. 1, are so wide, providing, as they do, that the High Court may release on bail a person who has given notice of appeal against conviction, that it is impossible to say that the High Court has not been given power to release on bail a person who has been convicted and sent forward for sentence under s. 29 of the Criminal Justice Act, and who has appealed against his conviction.

I repeat that the court will exercise the power with extreme care and will require to see the prisoner's previous history of convictions.

HUMPHREYS, J. So far as I am concerned, that is the judgment of the court.

DEVLIN, J. I agree.

(Counsel then addressed the court on the merits, and the application for bail was refused.)

Application refused.

Solicitors: *Mawby, Barrie & Letts, for Silverman & Livermore, Liverpool; Solicitor, General Post Office.*

1951
Jan. 24.

Lord Goddard, C.J., Humphreys and Devlin, JJ.

ROE *v.* HEMMINGS AND ANOTHER.

Customs and Excise—Export of prohibited goods without licence—Prohibited goods brought to "any quay or other place" for purpose of being exported—Construction—"Other place" not ejusdem generis with "quay"—Import, Export and Customs Powers (Defence) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 69), *s.* 3, *sub-s.* 1*—Export of Goods (Control) (Consolidation) Order,* 1949, *S.I.* 1949, *No.* 2466.

A grocer delivered to the residence of a nightwatchman employed at London Docks on Swedish ships consignments of coffee amounting in all to 666 lbs. The nightwatchman sold the coffee to Swedish and other seamen, who took it on board their ships and either consumed it there and then or exported it. He accounted to the grocer for those sales, and was paid commission on them. The export of coffee without a licence was prohibited by the Export of Goods (Control) (Consolidation) Order, 1949, but, as a matter of grace, the customs authorities allowed seamen to take on board small quantities of coffee for their own consumption. Informations were preferred

---

[Reported by Mrs. F. N. BUCHER, Barrister-at-Law.]

against the nightwatchman, as agent of the exporter, for contravening s. 3, sub-s. 1, of the Import, Export and Customs Powers (Defence) Act, 1939, which sub-section imposes penalties on the exporter or his agent of "any goods . . . brought to any quay or "other place" for the purpose of being exported in contravention of an order made under the Act of 1939. Informations were also preferred against the grocer for aiding and abetting the nightwatchman.

The magistrate dismissed the informations on the grounds that the words "or other place" in the section must be construed as ejusdem generis with "quay", and that the nightwatchman's residence was not ejusdem generis with a quay.

Held, (1.) that the words "or other place" in s. 3, sub-s. 1, were not to be construed as ejusdem generis with "quay" and that the nightwatchman's house was accordingly a "place" within the meaning of the sub-section: *Emerson* v. *Woods* [1942] N. I. 118, and *Attorney-General for Palestine* v. *Fakhry Ayyas* [1947] A. C. 332, followed; and (2.) that, even though, as a matter of grace, the Customs authorities permitted seamen to take on board small quantities of coffee, since the prohibition against the export of coffee was absolute, the offence created by s. 3, sub-s. 1, was complete when the coffee was assembled at the nightwatchman's house; and the fact that the sales to the seamen were of quantities so small as to be allowed to be taken on board ship was relevant only in possible mitigation of penalty.

Case stated by the metropolitan magistrate sitting at Thames magistrates' court.

On September 26, 1950, Herbert Maurice Roe, a customs and excise officer, preferred six informations against the first defendant, Percy Alfred Hemmings, alleging that, on various dates in April and May, 1950, "he was the agent of the exporter of "prohibited goods to wit" (a specified number of pounds) "of "coffee that were brought to a place to wit London for the "purpose of being exported" in contravention of the Export of Goods (Control) Consolidation Order, 1949 (which prohibits the export of coffee without a licence), and s. 3, sub-s. 1, of the Import, Export and Customs Powers (Defence) Act, 1939 (1). Six informations were also preferred against the second defendant, William George Rowell, alleging that he aided and abetted the first defendant in the commission of those offences.

---

(1) Import, Export and Customs Powers (Defence) Act, 1939, s. 3, sub-s. 1:—"If any goods—(a) are "imported, exported . . . in contravention . . . of an order under this "Act . . . or (b) are brought to any "quay or other place, or waterborne, "for the purpose of being exported . . . "in contravention . . . of an order "under this Act . . . those goods shall "be deemed to be prohibited goods "and shall be forfeited; and the "exporter of the goods or his agent ". . . shall be liable . . . to a customs "penalty of five hundred pounds . . ."

At the hearing of the informations the following facts were proved or admitted:—

The first defendant was a nightwatchman, living at 187, West Ferry Road, Millwall, and employed on Swedish vessels at London Docks. The second defendant was a grocer carrying on business at 111, West Ferry Road.

On or about the dates stated, the grocer delivered to the nightwatchman varying quantities of coffee, amounting in all to 666 lbs. The nightwatchman sold the coffee to Swedish and other seamen, by whom it was in fact exported, and handed over to the grocer the proceeds, on which he was allowed a discount. Both defendants knew that the coffee was to be sold to seamen who would take it to their ships and either there consume it or take it to Sweden. As a matter of grace, the customs authorities allow seamen to take on board small quantities of coffee for their own consumption.

It was contended for both defendants that the words "or "other place" in s. 3, sub-s. 1, of the Act must be construed as ejusdem generis with the preceding words "to any quay", and that the coffee was therefore not shown to have been brought to a "place" within the meaning of the sub-section as so construed.

The magistrate was of opinion that that contention was right, and that the nightwatchman's residence was not ejusdem generis with a quay. He therefore dismissed all the informations.

The prosecutor appealed.

J. P. Ashworth for the prosecutor. The issue in this case is whether the words "or other place" are ejusdem generis with "a quay"; but the real contrast is between "any quay" and "any other place": see *Emerson* v. *Woods* (2), and *Attorney-General for Palestine* v. *Fakhry Ayyas* (3). Those cases were not brought to the notice of the magistrate. But, apart from authority, export by air is also within the contemplation of the Act: see s. 1, sub-s. 4, and s. 6, sub-s. 4; yet an airport cannot be said to be ejusdem generis with a quay.

Fearnley-Whittingstall, K.C., and *Eric Myers* for the defendant grocer (the defendant nightwatchman did not appear on the appeal). Aerodromes have been specified in the Act precisely because they are not ejusdem generis with a quay; otherwise it would be superfluous to mention them. It is not now contended that the words "any other place" have to be read as ejusdem generis with a quay. But in order to establish an offence against s. 3, sub-s. 1, it is necessary to prove both that the coffee was brought to the "place" for export, and also that it was for export in breach of customs law. There is not enough evidence to establish that. There is nothing to prove that any parcel of coffee sold was of more than two pounds in weight, or that the coffee was not for immediate consumption on board in the docks; or that larger amounts than the customs authorities in fact permitted to be taken on board were sold to any one seaman. If the customs officers in fact allowed some latitude in the matter, the law was not being broken.

---

(2) [1942] N. I. 118, 127, 129.

(3) [1947] A. C. 332.

[Lord Goddard, C.J. The fact that the customs allow small quantities of coffee to be taken on board does not mean that it is not an offence against the statute to export the coffee.]

If the regulations were informally relaxed, in the manner which has been found, there is no evidence that this coffee was taken to the nightwatchman's house for the purposes of illegal export.

Lord Goddard, C.J., referred to the facts, read s. 3, sub-s. 1, of the Import, Export and Customs Powers (Defence) Act, 1939, and continued:—On that sub-section the point was taken that the words " or other place " must be construed as ejusdem generis with a quay. The magistrate came to the conclusion that that contention was correct, and that the nightwatchman's residence was not ejusdem generis with a quay. He therefore dismissed the summons.

It is enough to say that that point has been disposed of in the courts of Northern Ireland in *Emerson* v. *Woods* (4), where the Chief Justice of Northern Ireland, with whom I entirely agree, said that the words " or other place " are not to be confined to something ejusdem generis with " quay ". That case was cited to the Judicial Committee of the Privy Council in *Attorney-General for Palestine* v. *Fakhry Ayyas* (5), and their advice to His Majesty was on exactly the same grounds as the decision in Northern Ireland. It is therefore quite clear that the magistrate, to whom, it is fair to say, these two cases were not cited, was wrong in holding that the words " or other place " must be construed as ejusdem generis with " quay ".

It was further argued for the defendant grocer that the nightwatchman's residence ought not to be regarded as a " place " within the meaning of s. 3, sub-s. 1, because the coffee was brought to his house for the purpose of sale to seamen in small quantities and because the customs authorities, as a matter of grace, allow small quantities to be taken on board ship by seamen. There is no finding with regard to that in the case, nor could there be, for there is an absolute prohibition against the export of coffee. Therefore, if a person is charged with committing an

(4) [1942] N. I. 118.

(5) [1947] A. C. 332.

1951

ROE v. HEMMINGS.

Lord Goddard, C.J.

offence against s. 3, sub-s. 1, and it is shown that he was taking coffee to a particular place for the purpose of selling it to seamen to take out of the country, an offence has been committed. If it was sold in such circumstances that, had the seamen been found in possession of it, the customs authorities might have allowed them to take it on board, that fact might be taken into account in mitigation; but it is not a defence. We therefore answer the question put to us by saying that the magistrate placed a wrong construction on s. 3, sub-s. 1. The case must go back to him with that intimation, and with a direction to conclude the hearing.

I think it unfortunate that the two authorities cited to us, which must have been known to the customs authorities, were not cited to the magistrate. The public authorities who are responsible for these prosecutions generally keep up to date in respect of reported decisions. Had those two cases been cited to the magistrate it is reasonable to suppose that he would have decided differently.

HUMPHREYS, J. I entirely agree.

DEVLIN, J. I agree.

Appeal allowed.

Solicitors: *Solicitor of Customs and Excise; Tarlo, Lyons & Co.*

C. C. A.

1951 Jan. 29.

Lord Goddard, C.J., Humphreys and Devlin, JJ.

REX v. ALBURY.

Criminal law—Sentence—Corrective training—Consecutive sentences—Validity.

A sentence of corrective training, being a discretionary sentence, may be imposed to follow an existing sentence of corrective training passed on the person detained in respect of another offence.

Rex v. *Wilkes* (1770), 19 State Tr. 1075, applied.

QUESTION referred to the court by the Secretary of State under s. 19 (*a*) of the Criminal Appeal Act, 1907.

On November 3, 1949, the appellant, Leonard Alfred Albury, was sentenced to two years' corrective training at the County of Middlesex Sessions on charges of housebreaking and shopbreaking. After he had served one month of the sentence, he made a statement to the police in which he admitted guilt in respect of six other offences. On March 2, 1950, he was charged at Middlesex Sessions in respect of two of those offences, and asked that the other four might be taken into consideration. He was thereupon sentenced to two years' corrective detention to follow the sentence already passed on him.

The question referred to the court was whether the second sentence passed on the appellant was good in law.

M. O. Havers for the appellant. The sentence of two years' corrective training to follow a previous sentence of corrective training is bad in law. In *Rex* v. *Wilkes* (1) the judges, in answering a question asked them by the House of Lords, said that in the case of a misdemeanor, as opposed to that of a felony for which the only sentence at that time was death, "a judgment "of imprisonment against a defendant to commence from and "after the determination of a sentence to which he was before "sentenced for another offence is good in law". Until the passing of the Criminal Law Act, 1827, there was no power to pass a consecutive sentence in the case of felony. That Act was amended by the Penal Servitude Act, 1853, so as to allow a sentence of penal servitude to follow one of imprisonment. That provision was again amended by the Criminal Justice Act, 1948, which deleted from s. 10 of the Act of 1827 any reference to penal servitude. The Act of 1948 created the punishment of corrective training, but nowhere amends the Act of 1827 so as to allow consecutive sentences to be passed. Corrective training is not imprisonment within the meaning of s. 10 of the Act of 1827, and in s. 21 of the Act of 1948 is referred to as a sentence "in lieu of any other sentence". Further, Sch. III to the Act gives power to release a person detained before the expiry of the full term to which he was sentenced. The effect of two sentences of corrective training to run consecutively would be to destroy, so far as the first sentence is concerned, the effect of the provisions of that Schedule in regard to release on licence, and would fetter the discretion of the Prison Commissioners. [He referred to *Rex* v. *Beamon* (2), *Rex* v. *O'Neill* (3) and *Rex* v. *Johnson* (4).]

Buzzard for the prosecution. The sentence passed in this case was good in law since, it is submitted, the ruling of the judges in *Rex* v. *Wilkes* (5) on the question of consecutive sentences of imprisonment in the case of misdemeanors applies equally in the case of sentences of corrective training. Where a sentence

(1) (1770) 19 State Tr. 1075.
(2) (1948) 32 Cr. App. R. 181.
(3) (1948) 33 Cr. App. R. 19.
(4) (1911) 7 Cr. App. R. 97.
(5) 19 State Tr. 1075.

is discretionary, and corrective training is such a sentence, there is no objection in law to the passing of a second sentence to follow immediately after a previous sentence.

LORD GODDARD, C.J. This is a reference by the Home Secretary to this court under s. 19 (*a*) of the Criminal Appeal Act, 1907, under which the court have the same powers as if they were dealing with an appeal.

Two questions arise: one a question of law, namely, whether a second sentence of corrective training can be passed to follow an existing sentence of corrective training, and the other, a question of discretion whether the sentence in the present case should be altered.

With regard to the first point, we do not feel any difficulty. Mr. Havers, very properly, called our attention to such cases as there are on the subject and to the relevant statutes, but we think that the position at common law was clearly indicated in *Rex* v. *Wilkes* (6). In that case the judges, who were consulted by the House of Lords, were asked, "whether a judgment "of imprisonment against a defendant, to commence from and "after the determination of an imprisonment to which he was "before sentenced, is good in law". As is well known, Wilkes was before the court on a charge of misdemeanor, and, in the days when his case was tried, the judgment passed by the court for treason or felony was death. There was no question about that, and so the judges, in giving their opinion, pointed out the difference between treason and felony and misdemeanor. In the case of felonies there was one definite sentence, namely, death; so no question could arise of passing a sentence to follow on another sentence. If a man had been sentenced to be hanged, there was no point in again sentencing him to be hanged. In the case of a misdemeanor, however, the sentence was discretionary, and accordingly the answer of the judges to the question propounded to them by the House of Lords was, "that a judgment of imprisonment against a defendant, to commence from "and after the determination of an imprisonment to which he "was before sentenced for another offence, is good in law".

The alteration made in the law by the Criminal Law Act, 1827, which, on a conviction of felony, enabled a sentence to be tacked on to a sentence which the prisoner was already serving, was due to the fact that by the time the Act of 1827 was passed the series of Acts of Parliament which mitigated the rigours of the criminal law had already begun to be passed, and, instead of a sentence of death in the case of felonies, there were a great many cases in which a sentence of imprisonment

(6) 19 State Tr. 1075.

could be passed. We feel no doubt, therefore, that, where a sentence is a discretionary one—and a sentence of corrective training is that—the principle to be applied is exactly the same as was held applicable in cases of misdemeanors in Wilkes' day. Therefore, as the sentence of corrective training is discretionary, we see no reason in law why it should not be possible to impose a sentence of corrective training to follow immediately after a sentence of corrective training.

One point to which Mr. Havers called our attention was that in Sched. III to the Criminal Justice Act, 1948, the Act which first enabled the sentence of corrective training to be passed, it is provided that: "The Prison Commissioners may release on "licence a person sentenced to corrective training or preventive "detention after he has served such portion of his sentence as "may be determined in accordance with rules made under s. 52 "of this Act". That provision only puts sentences of corrective training and preventive detention on the same footing as sentences of imprisonment, that is to say that, when two-thirds of the sentence has been served, if the prisoner has behaved himself in the prison, he may be released, subject to reporting in such circumstances and to such persons as are laid down in the Act. But we do not see that that provision really raises any difficulty: if the prisoner earns the one-third remission to which he would become eligible, his second sentence will begin to run.

Our conclusion therefore is that there is no objection in law to passing a sentence of corrective training to follow another sentence of corrective training; and the authorities will deal with a prisoner so sentenced in exactly the same way as they would deal with a prisoner who had received two consecutive sentences of imprisonment at two different times.

[The court considered the sentence imposed and altered it to one of two years and eight months, to run concurrently with the sentence already being served.]

Sentence varied.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

P. B. D.

1951
Feb. 2.

Lord Goddard, C.J., Humphreys and Devlin, JJ.

WINKLE *v.* WILTSHIRE.

National insurance—Fictitious insurance stamps—Possession without lawful excuse—Innocent purchase from unauthorized seller—Offence committed—Post Office Act, 1908 (8 *Edw.* 7, *c.* 48), *s.* 65, *sub-s.* 1—*Industrial Injuries (Stamps) Regulations*, 1948 (*S.I.* 1948, *No.* 1443).

By s. 65, sub-s. 1, of the Post Office Act, 1908, as applied to national insurance stamps by the Industrial Injuries (Stamps) Regulations, 1948, "A person shall not . . . (*b*) have in his possession, unless he shows a lawful excuse; any fictitious stamp; . . .".

A person who proves that he innocently bought fictitious insurance stamps from an unauthorized or unlicensed seller does not establish a "lawful excuse" within the meaning of the regulation for having the stamps in his possession. To avail himself of the defence provided in it he must further show that he acquired the stamps as the result of a lawful transaction between himself and a seller legally entitled to deal in the stamps.

Case stated by the Metropolitan police magistrate sitting at West Ham magistrates' court.

An information was preferred against the defendant, William Herbert Wiltshire, at the instance of the Postmaster-General, charging him with having in his possession without lawful excuse seven fictitious national insurance stamps, contrary to s. 65, sub-s. 1 (*b*), of the Post Office Act, 1908, as applied to national insurance stamps by the National Insurance and Industrial Injuries (Stamps) Regulations, 1948 (S.I. 1948, No. 1443) (1).

The following facts were proved or admitted at the hearing before the magistrate:—The defendant was the licensee of a public-house and had in his employment one adult male employee. He stamped the national insurance cards for the employee for the years ending March 5, 1950, and March 4, 1951, with 9*s.* 1*d.* national insurance stamps, of which twenty-two were fictitious, being forged. The stamps had not been bought from a post office but were bought by the defendant in his public-house from a man known to him as "Tom", whom he believed to be a sub-contractor at a power station. The defendant also believed that the stamps were some which "Tom" had bought for his own use and which he no longer required. The defendant paid 9*l*. 18*s*. for the stamps, of which 18*s*. was returned to him, so that he actually paid 9*l*. for stamps of the face value of 9*l*. 19*s*. 10*d*. The man "Tom" was not in the service of the post office or of the Ministry of National Insurance, and he had not been appointed to sell or distribute, or been licensed to deal in insurance stamps.

---

(1) By s. 65, sub-s. 1 of the Post Office Act, 1908, as applied to national insurance stamps by the Industrial Injuries (Stamps) Regulations, 1948 (S.I. 1948, No. 1443): "A person shall not—(*a*) make, "knowingly alter, deal in or sell, "any fictitious stamp, or knowingly "use for the purpose of payment of "contributions under the National "Insurance (Industrial Injuries) Act, "1946, or the National Insurance "Act, 1946, any fictitious stamp; or "(*b*) have in his possession unless "he shows a lawful excuse; any "fictitious stamp; . . .".

At the time when the defendant bought the stamps he did not know that they were fictitious, honestly believed that they were genuine, and was unaware that "Tom" was not authorized to deal in insurance stamps.

It was contended for the prosecutor that, by virtue of the Stamp Act, 1891, as applied to insurance stamps by the regulations, it was unlawful for the man "Tom" to sell the stamps, and that it was not lawful to buy stamps otherwise than from a duly authorized person. It was also contended that it was unlawful for the defendant to buy the stamps irrespective of whether he did or did not know that they were fictitious.

The magistrate held that the seller of the stamps, not being licensed to deal in them, was liable to a penalty for selling them. He agreed that the onus of showing that he had a lawful excuse for being in possession of the stamps was on the defendant, and that, if he acquired possession of the stamps by means of an unlawful transaction, he could not show a lawful excuse. He accepted the complete good faith of the defendant in the transaction and was of opinion that the question was whether, if the sale was unlawful, the defendant was acting unlawfully in buying the stamps however innocent his motive. The magistrate said that his attention had not been directed to any provisions in the statutes or regulations penalizing any person who bought national insurance stamps from an unauthorized or unlicensed person. In his view, if the defendant was acting unlawfully in the transaction, then anybody buying a postage stamp from a friend was acting unlawfully. That was a proposition which he could not accept. He was satisfied that the defendant had shown a lawful excuse for being in possession of the fictitious stamps, and accordingly he dismissed the information. The prosecutor appealed.

J. P. Ashworth for the prosecutor. The decision of the magistrate was wrong, and the defendant was guilty of the offence with which he was charged. The regulations made in 1948 adapted to the case of insurance stamps the relevant provisions of the Stamp Act, 1891, and the Post Office Act, 1908. Section 4 of the Act of 1891 imposes a penalty on any unauthorized person who deals in insurance stamps.

1951

Winkle v. Wiltshire.

By s. 65 of the Act of 1908, as adapted to the case of insurance stamps, "A person shall not—(*a*) make, knowingly "alter, deal in or sell any fictitious stamp . . . or (*b*) have in "his possession unless he shows a lawful excuse; any fictitious "stamp;". The prohibition in para. (*b*) is not concerned with the sale of fictitious stamps; a sale of any stamp, fictitious or genuine, by an unauthorized person is an offence, and the lawfulness or otherwise of the transaction between the defendant and the seller of the stamps had nothing to do with their fictitious character.

For the defendant to establish a lawful excuse for having the stamps in his possession it would not be sufficient for him to prove that he was unaware of their fictitious character: he must also show that he acquired them as the result of a lawful transaction between the seller and himself. [He referred to *Dickins* v. *Gill* (2), and *Rex* v. *Jacobs and others* (3).]

Southall for the defendant. The decision of the magistrate was right. There is no prohibition in the regulation against the buying of stamps, and therefore to buy them is not an offence. The lawful excuse of the defendant for having the stamps in his possession was that he had bought them for the purpose of discharging his obligations under the National Insurance Act by affixing the stamps to the card of his employee. If he had bought the stamps for the purpose of re-selling them, he would have had no lawful excuse; but to have them in his possession for the purpose for which they were issued must constitute a lawful excuse. In *Dickins* v. *Gill* (4) Grantham, J., said that belief in the genuineness of the article in question (in that case a die and instrument for making an artificial stamp) would be a lawful excuse, and that dictum is a direct authority in favour of the defendant. On the regulations as they stand, the use of a fictitious stamp without knowledge that it is fictitious is, under para. (*a*), not unlawful. Para. (*b*) should be construed in the same way, with the result that the possession of a fictitious stamp for a proper purpose and without knowledge of its fictitiousness, is a lawful possession.

Ashworth in reply.

Lord Goddard, C.J. What the regulations have done is merely to apply the Stamp Act, 1891, and the Post Office Act, 1908, which only relate to postage and revenue stamps, to these new national insurance stamps. The defendant bought the stamps from a man whom he knew as "Tom", who was a customer at his public-house. The defendant said, and apparently the magistrate accepted the statement, that he thought that "Tom" was a sub-contractor at a neighbouring power station, and that he showed him the stamps which he said he did not want. The moral of the case perhaps is that one should not buy stamps from a person whose surname, even, one does not know, and that it is dangerous to buy stamps at a discount of 10 per cent.

---

(2) [1896] 2 Q. B. 310.
(3) [1944] K. B. 417.
(4) [1896] 2 Q. B. 310.

The case is, perhaps, not one of such hardship as might sometimes arise in this class of case. The magistrate found that the person from whom the defendant bought the stamps was not licensed to deal in stamps and would be incurring a penalty in selling them. He held that the onus of showing a lawful excuse was on the defendant, and that if he acquired the stamps by means of an unlawful transaction he could not show a lawful excuse.

The magistrate accepted the good faith of the defendant in the transaction, and said: "I was of the opinion that if the "defendant was acting unlawfully in this transaction, then any-"body buying a postage stamp from a friend was also acting "unlawfully and I could not accept this proposition". That, I think, shows the fallacy of confusing matters which may go very strongly in mitigation with matters which afford a defence. The magistrate went on: "I was satisfied that the defendant had "shown a 'lawful excuse' for possessing these fictitious stamps "and I accordingly dismissed the information".

The only way in which that decision could possibly be upheld would be by saying that the words "without lawful excuse" mean the same as "with knowledge", because, to support the magistrates' finding the section would have to read: "A person "shall not knowingly have in his possession any fictitious stamp, "or shall not have in his possession any stamp which he knows "to be fictitious". That, however, is not what the section says: the words are "without lawful excuse", and it cannot be a lawful excuse to say: "I did not know that the stamps were "forged", because that could only be a defence if the buyer had bought the stamps properly from an official at a post office or from a licensed dealer, those being the only persons who have authority to sell stamps and who may do so without incurring a penalty. Of course, if a person bought stamps at a post office which turned out to be fictitious he would have a perfectly lawful excuse unless, indeed, he recognized and knew that they were fictitious; in which case he would not have the excuse.

Mr. Southall has argued that we ought to construe para. (*b*) of the regulation in the same way as para. (*a*), because, he says, a person is only guilty under para. (*a*) if he knowingly uses for the purpose of payment of contributions a fictitious stamp; but I think that the answer which Mr. Ashworth has made is quite conclusive on that point: a person may acquire fictitious stamps and have a lawful excuse for having them in his possession; but he may afterwards be told that they are fictitious; and then, if he uses them, he will be guilty of an offence under para. (*a*) of the regulation although he would not be guilty of an offence under para. (*b*). Mutatis mutandis I think that he could be guilty of an offence under para. (*b*) without being guilty of an offence under para. (*a*).

In my opinion, where a man can only show that he did not know that the stamps in his possession were forgeries, that, in itself, is not a lawful excuse: he must go further and show that he acquired them lawfully; for unless he acquired them lawfully he will not have a lawful excuse.

However hard it may be—for I dare say that a great many people do not know that the sale of stamps by a person who is not licensed or an officer of the post office is an unlawful sale—the regulation has made it an offence.

Although there may be circumstances of mitigation, I am clearly of opinion that the offence was complete, and that no defence was shown. Therefore the case must go back to the magistrate with a direction to convict.

HUMPHREYS, J. I agree.

DEVLIN, J. I also agree.

Appeal allowed.

Solicitors: *The Solicitor, Ministry of National Insurance; Daybells.*

P. B. D.

REGOR ESTATES LD. *v.* WRIGHT.

[Plaint No. F. O. 288.]

C. A.

1950
Dec. 8.

Cohen and Denning, L.JJ., and Danckwerts, J.

Landlord and tenant—Lease—Construction—Premium—Legal requirement by landlords in 1948 *of a premium for grant of fourteen years' lease—Covenant by lessee for payment of premium—Premium payable by instalments over ten years—Proviso for re-entry for breach of covenant—Demand by landlord for payment of instalment after the passing of the Landlord and Tenant (Rent Control) Act,* 1949*—Whether a requirement as a condition of "the continuance" of a tenancy—Whether a demand for increased rent—Landlord and Tenant (Rent Control) Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 2, *sub-ss.* 1, 5 *and* 7.

Landlords in November, 1948, required a premium from a prospective tenant of 360*l.*, payable as to 60*l.* on the execution of a lease for fourteen years and as to the balance of 300*l.* by instalments of 30*l.* a year over the next ten years, as a condition of the grant of the tenancy at a yearly rent (being a premium valid by virtue of sub-s. 3 of s. 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920). The tenant agreed and the lease was executed in December, 1948, containing a covenant to pay the rent and to pay the ten instalments of the premium on the days specified in the lease, with a proviso for re-entry on breach of covenant. The court assumed the proviso to be applicable to a breach of covenant to pay the instalments of the premium. There was a covenant in the lease against the tenant's assigning or underletting the demised premises without the written consent of the landlords which, subject to cl. 2 (*b*), was not to be unreasonably withheld. By cl. 2 (*b*), in the event of the tenant's desiring to assign or underlet the demised premises, it was to be a condition of the granting of the landlord's consent that all remaining instalments of premium should be paid by the tenant to the landlord. The tenant entered on the demised premises.

On February 1, 1950, the landlords' solicitors wrote a letter to the tenant demanding payment of 30*l.*, an instalment of the premium, as being due from the tenant on November 11, 1949, but still unpaid, making no claim for possession, and the landlords, subsequently, sued the defendant for that sum under the covenant in the lease. The tenant alleged that to require payment of this 30*l.* by the letter of February 1, 1950, and the subsequent plaint note in the county court was to require payment of a premium for "the continuance of a lease" within the meaning of s. 2, sub-s. 1, of the Landlord and Tenant (Rent Control) Act, 1949, basing her plea on the proviso for re-entry in default of payment. Later she also contended that the claim was a demand for increased rent and, accordingly, illegal.

Held, (1.) that, since the landlords had only made a demand for the instalment of a premium required legally as a condition of "the grant" of the lease for fourteen years at a time before the

C. A.
1950

Regor Estates Ld. v. Wright.

Landlord and Tenant (Rent Control) Act, 1949, was in operation, and, since there was no threat to demand, or any demand for, possession of the premises on breach of covenant under the proviso for re-entry, there was no requirement of payment of a premium as a condition of "the continuance" of the lease within the meaning of s. 2, sub-s. 1, of the Act of 1949.

Held, also, (2.) that, having regard to the lease and also, since this was a document relating to the Rent Restriction Acts, having regard to the transaction as a whole, and assuming that the proviso for re-entry in the lease applied to the covenant binding the tenant to pay the premiums by instalments, the claim for this premium was not a claim for increased rent. The covenant to pay the premium was a personal covenant, as appeared from the provision in the lease that, on an assignment or underletting, it was a condition of the written consent of the landlord that all remaining instalments of the premium were then paid by the lessee. The covenant to pay the premium did not run with the land in the hands of an assignee. *Hill* v. *Booth* [1930] 1 K. B. 381, followed.

Appeal from Judge Hodgson, sitting at Kingston-upon-Thames county court.

By a letter dated October 21, 1948, the plaintiffs, as landlords, offered the defendant a fourteen years' tenancy of a flat, No. 3 Bushey Court, Hampton Wick, at the annual rent of 59*l*., and further required payment of 270*l*. as a condition for their granting an option on the lease. The tenant replied on October 26, that she thought 270*l*. too much, and she offered extra rent in stead. The landlords by letter dated October 27, pointed out that that was not possible under existing legislation, but offered to accept an increased consideration of 360*l*., payable as to 60*l*. on execution of the lease, and as to 300*l*. by ten equal annual instalments of 30*l*. These terms were accepted orally by the tenant on November 1, and confirmed in writing by the landlords on November 2. The tenant entered the flat in mid-November, when she paid the first 60*l*. of the premium. A lease was executed on December 15, 1948.

It was made between the landlords of the one part and the tenant, "who and whose successors in title and the persons "deriving title under her or them is hereinafter called 'the "'lessee'", and it witnessed as follows: 1. "In consideration of "the premium of 360*l*. payable as to 60*l*. on the signing hereof "(the receipt whereof the landlords hereby acknowledge) and, "subject as hereinafter provided, the balance thereof by ten "annual instalments of 30*l*. to be paid on the 11th day of "November in every year the first of such annual payments to "be made on the 11th day of November, 1949, and in considera-"tion of the rent hereinafter reserved and of the lessee's "covenants hereinafter contained the landlords Hereby demise "unto the lessee"—then followed a description of the premises with certain exceptions and reservations—"To hold the premises "hereby demised (hereinafter referred to as 'the demised "'premises') Unto the lessee for the term of fourteen years "from the 11th day of November, 1948, Yielding and paying "during the said term yearly and so in proportion for any fraction "of a year the rent of 59*l*.".

Clause 2 contained the lessee's covenants. Sub-cl. (*a*) was a covenant for the payment of rent on the usual quarter days; sub-cl. (*b*) was, "to pay to the landlords the ten annual instalments of premium on the days hereinbefore provided, but in "the event of the lessee desiring to assign underlet or part with "possession of the demised premises in accordance with the "provisions herein contained it shall be a condition of the "granting of such consent that all remaining instalments of "premium are paid by the lessee to the landlords". By cl. 2 (*j*) the tenant covenanted "not to assign underlet or part with posses-"sion of the demised premises or any part thereof without the "previous written consent of the landlords and subject to the "provisions of cl. 2 (*b*) hereof such consent not to be unreasonably "withheld and within one month of the execution of any assign-"ment or underlease of the demised premises to produce the "same to the landlords' solicitors for registration".

There followed the landlords' covenants of which (*a*) was:—"That the lessee duly paying the said rent and observing and "performing the agreements herein contained may peaceably and "quietly hold and enjoy the demised premises without any inter-"ruption by the landlords or any person lawfully claiming under "or in trust for them".

The proviso for re-entry was as follows: "Provided always "and this lease is upon the express conditions following that is "to say:—(1.) If any rent shall be in arrear for fourteen days or "upwards, whether legally demanded or not, or if there shall be "a breach of any of the lessee's covenants herein contained or if "the lessee or other person in whom the term hereby granted "shall be vested shall become bankrupt or enter into any "arrangement with his or her creditors or shall suffer execution "to be levied on the demised premises, the landlords may re-"enter upon any part of the demised premises in the name of "the whole without giving notice to quit to the lessee and "thereupon the term created by these presents shall be deter-"mined but without prejudice to any rights or remedies of the "landlords in respect of any antecedent breach of the covenants "on the part of the lessee and conditions hereinbefore "contained".

On November 11, 1949, the first annual instalment of 30*l*. became due under the terms of the agreement and lease, but the tenant refused to pay it, because on June 2, 1949, the Landlord and Tenant (Rent Control) Act, 1949, had come into effect with retrospective significance as from March 25, 1949. The tenant alleged that to require payment of this 30*l*. was in effect to require payment of a premium for the continuance of the lease, because of the proviso for re-entry in default. She later further contended that it was a demand for increased rent and accordingly illegal. On February 1, 1950, the landlords' solicitors wrote to the tenant's solicitors asking for payment of the instalment of 30*l*. due on November 11, 1949, and stating that, failing payment, they proposed to institute proceedings. They made no claim to possession of the premises. The landlords subsequently sued the tenant, claiming 30*l*. as being payable under the lease dated December 15, 1948, as an instalment of premium.

In giving judgment, the county court judge said: "I think "that the correspondence clearly shows that there was an "intention to take a premium for the grant of the lease. There "was no intention to evade the Acts. The tenant, when she "suggested a payment of a higher rent, in all probability was "acting bona fide. But the landlords knew the relevant statutes. "They answered at once: 'We cannot take more rent'. They "asked for a premium, and, as the term was for fourteen years, "they were fully entitled so to do. I hold that the parties "intended that the lease for fourteen years should be granted in "consideration of this premium and that the rent reserved should "be 59*l*. The instalments of premium were payable not on the "usual quarter days, when the rent was due, but on "November 11. They were not payable during the whole term, "but only for the first ten years. The rent went on for the "whole term of fourteen years. Finally, I hold that the liability "to pay these annual instalments would not have ceased if the "proviso for re-entry had been enforced; the personal promise "remained. I cannot hold that these payments were rent or "that they were masquerading merely as premiums to evade the "statute.

"The request for the 30*l*. was, in my judgment, not a "requiring of a payment for the continuance of a lease or "tenancy. It was rather a request for the performance of the "promise already given by the tenant and subject to an agreed "sanction. There seems to me to be no reason why the parties "should not agree this mode of payment for the grant, nor "why their agreement should not be given efficacy by an "adequate sanction". Accordingly, he gave judgment for the plaintiffs for the sum claimed.

The tenant appealed.

Pearl and *J. W. Wellwood* for the tenant. The requirement to pay this premium which was made by the landlords' solicitors' letter on February 1, 1950, or by the subsequent plaint note taken out by the landlords in the county court, was made after the passing of the Landlord and Tenant (Rent Control) Act, 1949, on June 2, 1949. It is conceded that if the requirement had been made before March 25, 1949, to which date the Act of 1949 had some retrospective effect, on this issue the tenant would have no case. The lease contained a re-entry clause for breach of covenant, and one of the covenants of the lease was to pay the instalments of the premium, one of which was here claimed by the action. By sub-s. 1 of s. 2, a person shall not as a condition of the continuance of the tenancy require the payment of any premium in addition to the rent (1). In view of the re-entry clause applying to this breach of covenant to pay the premiums

(1) By s. 8 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended with regard to "new control" houses: "A "person shall not, as a condition of "the grant, renewal or continuance "of a tenancy or sub-tenancy of any "dwellinghouse to which this Act "applies, require the payment of any "fine, premium or other like sum, or "the giving of any pecuniary con"sideration, in addition to the rent ". . .".

By sub-s. 3: "This section shall "not apply to the grant, renewal or "continuance for a term of fourteen "years or upwards of any tenancy". This section is now repealed. See infra.

The side-heading to s. 2 of the Landlord and Tenant (Rent Control) Act, 1949, is: "Prohibition of "premiums on grant or assignment "of tenancy".

By that section: (1) "A person "shall not, as a condition of the "grant renewal or continuance of a "tenancy to which this section "applies, require the payment of any "premium in addition to the rent".

By sub-s. 5: "Where, under an "agreement made after March 25, "1949, any premium has been paid "which, or the whole of which, could "not lawfully be required under the "foregoing provisions of this section "(or, if the premium was required "before the commencement of this "Act" (June 2, 1949) "which could "not lawfully have been required if "this Act had been in force), the "amount of the premium, or so much "thereof as could not lawfully be "required or have been required, as "the case may be, shall be recover"able by the person by whom it was "paid:

"Provided that where an agree"ment has been made since the said "March 25 and before the com"mencement of this Act, and the "agreement includes provision for "the payment of a premium which "could lawfully be required under "the enactments hereby repealed but "which, if paid in pursuance of the "agreement, would be recoverable, "wholly or in part, by virtue of the "foregoing provisions of this sub"section, the agreement shall, with"out prejudice to the operation of this "section, be voidable at the option "of either party thereto".

Sub-s. 6 imposes a penalty on any person requiring a premium in contravention of this section. By sub-s. 7: "Section 8 of the Increase of Rent "and Mortgage Interest (Restric"tions) Act, 1920, is hereby repealed; "but, without prejudice to the opera"tion of s. 38 of the Interpretation "Act, 1889, nothing in this section "shall be construed as affecting the "operation of the said s. 8 as respects "anything done before the commence"ment of this Act".

on the dates stipulated, this was a requirement for the payment of a premium as a condition of the continuance of the tenancy. It makes no difference that the exercise by the landlords of their power to re-enter for breach of the covenant was permissive. The decision in *Colton* v. *Becollda Property Investments Ld.* (2) was on a state of affairs which existed before the Act of 1949 operated and has no bearing on the issue before the court. [*Baily* v. *De Crespigny* (3), referred to.]

Secondly, the 360*l.* called a premium was really increased rent. There was a specific obligation on the lessee to pay this sum, which was payable in any event. Not unnaturally, landlords have resorted to devices by which they can charge a rent which can be called an economic rent: see *Rush* v. *Matthews* (4).

[Cohen, L.J. Surely if the covenant to pay the instalments of premium does not run with the land, the premiums cannot be rent? This covenant appears to be personal to the tenant, since, by the terms of the lease, in the event of her desiring to assign, underlet or part with possession of the demised premises, it is a condition of the granting of written consent by the landlords that all remaining instalments of premium shall be paid by the lessee to the landlords: see *Hill* v. *Booth* (5).]

The lessee covenants to pay the instalments of premium, and the tenant is a person "who and whose successors in title and "the persons deriving title under her or them is hereinafter called "'the lessee'". This payment was described as a premium in the lease, but, as Uthwatt, J., said in *Samuel* v. *Salmon and Gluckstein Ld.* (6), the court is not bound by the vocabulary which the parties have chosen to use.

Avgherinos for the landlords [called on to argue only on the first point]. The requirement of this premium, that is to say, of the 360*l.*, was made for the grant of this lease before the Landlord and Tenant (Rent Control) Act, 1949, was passed and before the date when it had any retrospective operation. The Act of 1949, therefore, when it was passed on June 2, 1949, had no operative effect on the requirement for the payment of this premium. It is beyond belief that the same instalment of premium can be required for the grant of a lease and also for its continuance. Contracts to pay premiums made before March 25, 1949, are not affected by the passing of the Act of 1949: the requirement to pay this instalment was made in 1948. And by s. 2, sub-s. 7, of the Act of 1949, "without prejudice to the "operation of s. 38 of the Interpretation Act, 1889, nothing in "this section shall be construed as affecting the operation of" s. 8 of the Increase of Rent and Mortgage Interest (Restrictions)

(2) [1950] 1 K. B. 216.
(3) (1869) L. R. 4 Q. B. 180.
(4) [1926] 1 K. B. 75, 492.
(5) [1930] 1 K. B. 381.
(6) [1946] Ch. 8, 13.

Act, 1920 (by this sub-section repealed), " as respects anything " done before the commencement of this Act ". This premium when required for the grant of the lease was validated by virtue of sub-s. 3 of s. 8 of the Act of 1920. The premium, the whole of it, was " required " in 1948, notwithstanding that part of it was made payable by instalments payable at dates over the next ten years: see *Colton* v. *Becollda Property Investment Ld.* (7), and per Jenkins, L.J. (8), who said: " The question, on " this part of the case, is whether the parties had, before " September 29, 1948, reached such a measure of agreement that " it can fairly be said that the premium in question was required " by the defendants as a condition of their granting a lease to " him of the premises for fourteen years from September 29, " 1948, being a then future date. In my judgment, if the facts " fairly support that conclusion, the section has not been " infringed. I think on the language of the section one must " look at the facts and see when the premium alleged to be an " illegal premium was required and what it was required for ". See also per Denning, L.J. (9).

Even if, contrary to the landlords' contention, there could be here a requirement of this instalment as a condition of the continuance of this lease, there was not such a requirement here, since neither the landlords' solicitors' letter of February 1, 1950, nor the subsequent plaint note made mention of any claim for possession of the premises under the re-entry clause. The claim was, and was always, merely for the payment of this instalment of the premium. There was never any threat or any intention on the part of the plaintiff company to determine the lease.

This instalment had been required as a part of the total premium on the grant of the lease. The mere fact that part of the premium was made payable by instalments and that there was a provision for re-entry by the landlords in case of a breach of covenant does not alter the character of the payment or the consideration for which it was paid. It was a consideration for the granting of the demise of this flat for fourteen years, and it does not matter that part of the payment was to be made by instalments over a number of years: see the observations of Scrutton, L.J., in *Hill* v. *Booth* (10), and of Greer, L.J., in the same case (11), who expressed the argument for the landlords as clearly as it can be put.

Lastly, it is submitted, the provision in the lease for re-entry does not apply for breach of this personal obligation by covenant to pay the instalments of the premium. The provision for re-entry is confined to the breach of the covenants which touch the land.

---

(7) [1950] 1 K. B. 216.
(8) Ibid. 227.
(9) Ibid. 230.
(10) [1930] 1 K. B. 381, 387.
(11) Ibid. 389.

Pearl replied.

COHEN, L.J. The lease executed on December 15, 1948, was a lease granted at a time when s. 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended with regard to "new control" houses, was in force, while s. 2 of the Landlord and Tenant (Rent Control) Act, 1949, was not in force, having no application before March 25, 1949. This lease being for a term of fourteen years was not within the mischief aimed at by sub-s. 1 of s. 8 of the Act of 1920. It was therefore in order for the landlords to demand and to receive a premium for the grant of the lease.

The two points relied on by the tenant were: (1.) that the alleged instalment constituted an illegal increase of rent, and, (2.) that the claim was within the mischief aimed at by s. 2, sub-s. 1, of the Act of 1949. It will be convenient to consider first the contention that the instalment claimed constituted an illegal increase of rent. Looking only at the lease itself, I entertain no doubt that on its true construction the provision as regards payment of a premium imposes a personal obligation on the original lessee and would not run with the land. True it is that the definition of "lessee" includes not only the original lessee, but also persons deriving title under him; but the premium is clearly expressed to be in consideration of the grant of the demise. It is plainly distinguished both from the rent and from the lessee's other covenants by cl. 1. Mr. Pearl pointed out that cl. 2 contained covenants by the lessee, and, generally speaking, "lessee" was to include successors in title of the original lessee; but when we come to cl. 2 (*b*) (and it is important in this connexion to remember that the provisions for payment of instalments are expressly made by cl. 1 subject to the provisions in clause 2 (*b*)), we find that it is a clause which provides that "in the event of the lessee desiring to assign under-"let or part with possession of the demised premises . . . it "shall be a condition of the granting of such consent that all "remaining instalments of premium are paid by the lessee to "the landlords". Where "the lessee" appears for the second time in that sub-clause it must, I think, as a matter of construction, mean "the lessee desiring to assign, underlet or part with "possession", and therefore, could only apply to the original lessee, since it must be he who first desires to assign, underlet or part with possession of the demised premises. The effect of the sub-clause, therefore, is to enable the landlords to insist, as a condition of granting their consent to an assignment, that the remaining instalments of premium be paid by the original lessee to the landlords before that consent is given. I see nothing in sub-cl. (*j*) which is in any way inconsistent with that construction of sub-cl. (*b*)—indeed, it seems to me, on the whole, that it supports the conclusion which I have indicated, because it provides that it shall not be considered to be an unreasonable withholding of the consent that the landlords require the provisions of sub-cl. (*b*) to be carried out.

The difficulty, if there is any, is caused, and caused only, I think, by the proviso for re-entry. In justice to Mr. Pearl's argument I should say that he really relied on the proviso for re-entry, which, he said, applied to the breaches of any covenant, in support of his argument on both branches of this case. He said that this is a breach of one of the lessee's covenants, and that there is nothing in the proviso for re-entry to indicate that cl. 2 (*b*) is excluded from the operation of the proviso; and that, I think, is true.

Mr. Avgherinos, in order to reserve the point, though he did not argue it fully before us, was prepared to submit that (a) the covenant, being a purely personal covenant on the lessee, does not run with the land, and, therefore, (b) is not within the meaning of "the lessee's covenants" where that phrase occurs in cl. 4, the proviso for re-entry. There is a great deal of force in that argument, but I propose to proceed, for the purposes of my judgment in this case, on the view that the proviso for re-entry does apply to the clause binding the lessee to pay the premium by instalments. Even so, I think that it remains a personal obligation which would not bind assignees from the lessee and does not affect the view which I have already formed that the premium is a premium and is nothing but a premium.

That is the view which I have formed on the construction of the document, and I derive some support for that view from the decision of this court in *Hill* v. *Booth* (12). In that case the lease provided that 800*l.*, part of a premium of 1,000*l.*, reserved by the terms of the document, should be payable by instalments, but there was an express provision (which there is not here) in terms that, in the event of the term being determined by re-entry all the premium unpaid would forthwith become payable. Here the only express provision, to that effect, is, in the event of consent to an assignment. There was in that case a proviso for re-entry, among other things, in the event of default in payment of an instalment; none the less the court had no hesitation in coming to the conclusion that the premium was what it was expressed to be—a premium.

(12) [1930] 1 K. B. 381.

C. A.
1950

REGOR ESTATES LD. v. WRIGHT.

Cohen, L.J.

I would refer in particular first to a passage from the judgment of Greer, L.J., where, having said that he thought it was a premium, he said (13): " The only doubt in my mind has arisen " upon the proviso for re-entry, which provides for re-entry not " merely on non-payment of the rent but on non-payment of " any instalment of the premium. That seems to make the " right of re-entry in respect of the premium an incumbrance " on the land. The right of forfeiture and the right of re-entry " are rightly described as incumbrances on the land, and I think " under the Act of 1925 that right of re-entry has gone. The " non-payment of the premium would not justify the lessor in " entering upon the land the freehold of which had become vested " in the lessee. But that does not affect the separate obligation " to pay the 1,000*l*. premium ".

Slesser, L.J., said (14): " That view that the premium is a " consideration for which the lease itself is granted, as appears " clear on the face of the lease itself, is made even more clear " by the fact that in the event of re-entry for non-payment of " rent or premium, while only a proportionate part of the rent " has to be paid up to the date of re-entry, it is expressly " provided in cl. 1 of the lease that all the premium unpaid " up to the date of re-entry shall become immediately due and " payable. Other provisions make it equally clear that the " premium of 1,000*l*. which is to be paid by instalments is not " rent or anything like rent ". I take Slesser, L.J., as meaning that he does not decide the case on the basis of the express provision making the whole amount payable, but as saying that, even apart from that, he would have come to the same conclusion.

Looking at the lease in the present case purely by itself, for the reasons which I have given I should come to the conclusion that it was an agreement for the payment of a premium so far as the 360*l*. was concerned and not an agreement for the payment of additional rent. But in considering a matter of this class and the effect of a document relating to the Rent Restriction Acts, we are not confined to the terms of the document, and we are bound to look at the transaction as a whole and consider whether it is within the prohibition of the Acts.

In a different connexion Uthwatt, J., made some observations in *Samuel* v. *Salmon & Gluckstein Ld.* (15) to which Mr. Pearl referred. Uthwatt, J., makes it clear that we are not bound by the vocabulary which the parties have chosen to use. In that particular case he held that the premium was rent. The facts are so different from the present case that we cannot gain anything by referring to them, but Uthwatt, J., said (16): "Land may be leased for a consideration which is not rent in "law or for a consideration which consists of or includes a rent. "The parties may write the agreement in such terms as they "please and, if so minded, may attach any label they wish to "the payments agreed to be made by the lease. But, when all "that is done, it is for the law to decide on the effect of the "document what payments are rent reserved and what not. "No label can create a fact: a label may accurately describe a "fact or it may mis-describe it, or may help to the solution of "a doubtful question of interpretation".

---

(13) [1930] 1 K. B. 381, 390.
(14) Ibid. 391.
(15) [1946] Ch. 8.

Mr. Pearl also referred to *Rush* v. *Matthews* (17), where the parties had plainly attempted to evade the Act by providing for weekly payments and calling them premiums in a separate document. On the facts of that case the court had no hesitation in coming to the conclusion that it was a pure evasion of the Act and was within the mischief aimed at by the Act, and, therefore, that the premium could not be enforced.

But there is every difference between evasion and avoidance, and I think that if we look at the lease before us as a whole, the county court judge arrived at the right conclusion about it in his judgment. I agree so entirely with his conclusion and with his reasons that I will say no more about that part of the case.

The more difficult question is the question whether the demand made by the plaintiffs, firstly, by letter of February 1, 1950; secondly, by issuing the plaint in this matter, was or was not an infringement of s. 2, sub-s. 1, of the Act of 1949: "A person "shall not, as a condition of the grant, renewal or continuance "of a tenancy to which this section applies, require the payment "of any premium in addition to the rent". Mr. Pearl says that it is plain that there was an infringement of this section. He accepted this from me, I think, as a fair statement of his argument: "Whenever, and only when, the landlord has a power "to determine, can there be a question of continuance, and if "the landlord demands money for not exercising the power it "infringes the section whether the power arises under contract "or under general law". He had in mind by "the general "law" a case which was put to him by my brother Denning, where a weekly tenancy would be determinable by notice and the landlord took a consideration for not exercising the right to give that notice. That latter case, speaking for myself, I should have thought was plainly within the mischief aimed at by the section, but I do not think that it necessarily follows that the position is the same, where the landlord has a pre-existing right to effect

(16) [1946] Ch. 8, 13.

(17) [1926] 1 K. B. 75, 492.

a forfeiture and demands money which he is entitled to obtain under a personal covenant, in no way threatening to exercise the right if the demand is not satisfied.

In the present case what has happened is that there has been a demand for payment of 30*l.* payable under the clause as an instalment of a premium. There is no threat that can be proved in the correspondence, nor any demand in the action for possession; and Mr. Avgherinos, in those circumstances, says that it cannot be said that there has been such a demand; he says that the requirement of a premium was made long before the Act of 1949 came into force.

It seems to me reasonably clear from the fact that a claim or requirement of a premium was made in the correspondence which led up to the lease of December 15, 1948, that the payment of the premium was expressed to be the consideration for the grant of the lease. Mr. Avgherinos says that the demand by action of an instalment of a premium contracted in December, 1948, to be paid is not the requirement of a premium within the mischief of the Act since it is not a requirement within the section. Finally, he says, the premium was required as a condition of the granting of the lease and not as a condition of its continuance.

I think, as I suggested in the course of the argument, that what the Act is concerned with is one of three alternative things —a grant of a lease, a renewal of a lease, or a continuance of a lease—and I find it impossible to visualize conditions in which something can be said to be both requiring the payment of a premium as a condition of the grant of a lease and a requirement of the payment of a premium as a condition of its continuance. In the present case it seems to me to be quite plain that there was the requirement of the payment of a premium as a condition of the grant of the lease.

That that is so, I think, appears quite plainly from the decision of this court in *Colton* v. *Becollda Property Investments Ld.* (18), which concerned the position before the coming into force of the Act of 1949. It does not in any way decide the question with which we are now concerned. In that case, to quote the headnote in the Law Reports, the respondent company's managing director, being the chairman of the board, "agreed orally to the offer of X, a statutory tenant of the flat "to take it for a term of fourteen years from September 29, "1948, on terms which included the payment of a premium "of 700*l.*, which was required by the landlords, subject to confirmation by the board of directors. On October 5, 1948, the "chairman wrote to X that, after consultation with his board,

(18) [1950] 1 K. B. 216.

C. A.
1950

REGOR ESTATES LD.
v.
WRIGHT.

Cohen, L.J.

"they had decided to accept his offer. On January 7, 1949, "the parties executed a lease containing the terms agreed, "including the payment of a premium, the habendum of which "was: 'To hold unto the tenant from the 29th day of September, "'1948, for the term of fourteen years'". It was held "that, "since the premium was required by the landlords before "September 29, 1948, as a condition of granting the lease, there "was a grant for a term of fourteen years of a tenancy within "the meaning of sub-s. 3 of s. 8 of the Increase of Rent and "Mortgage Interest (Restrictions) Act, 1920, as amended by "s. 3 and Sch. I of the Rent and Mortgage Interest Restrictions "Act, 1939, with regard to a new control dwelling-house. The "condition in the lease, requiring the premium, related back to "the original requirement for that premium made by the land-"lords before September 29, 1948".

The only importance of that case here is that it shows that the premium may properly be regarded as "required" at a stated date, notwithstanding that it was made payable, as it was in that case, by instalments payable at dates subsequent to the stated date.

Jenkins, L.J., said (19): "The question . . . is whether the "parties had, before September 29, 1948, reached such a measure "of agreement that it can be fairly said that the premium in "question was required by the defendants as a condition of their "granting a lease to him of the premises for fourteen years "from September 29, 1948, being a then future date. In my "judgment, if the facts fairly support that conclusion, the section "has not been infringed. I think, on the language of the section, "one must look at the facts and see when the premium alleged "to be an illegal premium was required, and what it was required "for; and if one finds a preliminary agreement for a lease for "fourteen years from a future date, one of the terms of which "is that the intending lessee shall pay a premium, then it seems "to me that within the meaning of the section the premium has "been required in respect of a lease of the exempted character, "namely, a lease for a period of fourteen years".

Denning, L.J., said (20): "In such a case the condition in "the lease requiring the premium would relate back, in my "opinion, to the original requirement made in the negotiations "before the tenant went in. There would be no breach of the "Act because the effective requirement was made before the "fourteen years started".

That case seems to me, therefore, to show that in connexion with matters of this kind one must look at what was the effective requirement; and, as I have said, I find it difficult to think that, since there was an effective requirement at the time of the original lease in December, 1948, it can fairly be said that either this letter of February 1, 1950, or the subsequent issue of the plaint by the landlords amounts to requiring the payment of a premium in addition to rent "as a condition of the grant, "renewal or continuance of a tenancy to which this section "applies". There is no condition imposed; there is no proved threat to discontinue the lease: there is merely an attempt to enforce a personal covenant, which was valid when it was imposed and which there is nothing in this section to invalidate.

---

(19) [1950] 1 K. B. 216, 227.

(20) Ibid. 231.

I am further led to this conclusion by sub-s. 5 of s. 2 of the Act of 1949. It seems to me that it would be strange indeed if a section which gives limited retrospective effect to agreements made after March 25, 1949, but before the coming into force of the Act, were to have an even more drastic effect on agreements made before March 25, 1949, than it had on those expressly covered by sub-s. 5. For, be it observed, if a landlord under an agreement made after March 25, 1949, but before the coming into force of the Act, is exposed to attack under the Act, he has, so to speak, a locus pœnitentiæ; but if Mr. Pearl is right the landlord under an agreement made before that date would be in an equally disadvantageous position but would have no locus pœnitentiæ. That, I think, is a reason for leaning against the construction which Mr. Pearl has asked us to adopt.

I think also (though I do not base my judgment on it) that sub-s. 7 of s. 2 of the Act of 1949 may affect the matter. It seems to me that Mr. Pearl's argument will hardly be consistent with the direction in that sub-section that the operation of s. 8 "as respects anything done before the commencement of this "Act" is not to be affected. Before the commencement of this Act his client entered into this covenant. That, in my view, was something done before the commencement of this Act; and it seems to me that if we were to accept Mr. Pearl's argument we should be saying in effect that sub-s. 1 of s. 2 was to affect that covenant which was something done "before the commence-"ment of this Act".

I think I have now covered all the points to which our attention was directed. For the reasons stated I entirely agree with the conclusion of the judge also on this point. For these reasons I would dismiss this appeal.

DENNING, L.J. I agree, and only wish to add a word on the second point. This lease was granted in December, 1948, for fourteen years in consideration of a premium of 360*l.* payable as to 60*l.* on the execution of the lease and subsequently by instalments of 30*l.* a year. It is said that since the passing of the Landlord and Tenant (Rent Control) Act, 1949, the instalments of premium are irrecoverable.

Under the Act of 1949 a landlord must not require a payment of a premium on any of the following agreements if made since the Act:—(1.) on a "grant of a tenancy" (which means an agreement to grant an initial tenancy); (2.) on a "renewal of "tenancy" (which means an agreement for a fresh tenancy following on the termination of the earlier one); and (3.) on a "continuance of a tenancy" (which means, I think, an agreement to continue an existing tenancy, as, for instance, by agreeing not to give notice to determine or to re-enter under a provision in that behalf). If the landlord should stipulate for a premium as a condition of any such agreement, then his act is unlawful and the stipulation is void no matter whether the stipulation is a part of the agreement or collateral to it.

But here no such agreement has been made since the passing of the Act of 1949. The only agreement was made before the Act, namely, in November and December, 1948. A premium was stipulated for the grant of the lease but that was lawful because it was granted before the Act and for a term of fourteen years. Since the Act of 1949 the tenancy has continued, but there has never been any agreement for its continuance. The agreement continued of its own force, and none the less so because there was a proviso for re-entry.

In my judgment the section does not invalidate contracts for a premium made in respect of a fourteen-year lease granted before March 25, 1949. If the tenant's contention in this case were right, he could hold all the benefits of the agreement and reject the burdens: he need only pay the rent of 59*l.* and pay none of the instalments of the premium; with the result that he would be better off under this agreement than if he had made a similar agreement after March 25, 1949. Under s. 2, sub-s. 5, of the Act of 1949, in the case of an agreement made between March 25, 1949, and June 2, 1949, the landlord has an option to avoid the agreement; but, if the tenant is right, in the case of an agreement made before March 25, 1949, the landlord loses his premium and has no such option. I cannot believe that the Act has that result. I agree, therefore, that the appeal should be dismissed.

DANCKWERTS, J. I agree. Section 2, sub-s. 1, of the Act of 1949 contains a prohibition in these terms: "A person shall "not, as a condition of the grant, renewal or continuance of a "tenancy, to which this section applies, require the payment of "any premium in addition to the rent". "Grant" means, obviously, a grant of a new lease; and "renewal", again, is a term which is easy to understand. "Continuance" appears to refer to the continuance of an existing tenancy, which will go

C. A.
1950
REGOR ESTATES LD. v. WRIGHT.
Danckwerts, J.

on unless something is done. One can easily understand the position where there is an undetermined tenancy like a tenancy from year to year or from month to month or from week to week, and it may clearly be forbidden to demand a premium as a condition of not giving notice to determine a tenancy of that class. But these words apparently are the same as those in sub-s. 3 of s. 8 of the Act of 1920, by which: "This section shall "not apply to the grant, renewal or continuance for a term of "fourteen years or upwards of any tenancy". So there is some reference there to a term of fourteen years. It is a little difficult to understand how it could apply in the same way to a lease for a term of fourteen years. It may be that if, a condition of re-entry having become exerciseable, the landlord demands a premium not otherwise provided for by the terms of the lease, or makes some demand of that kind as a condition of not enforcing his right of re-entry, the section would be infringed. But it seems to me that that does not apply to a case where there is merely a demand for payment of a sum which is already provided for by the terms of the original lease. In this case the premium, or the sum of 30*l.*, was payable by reason of the agreement between the parties contained in the original lease. The demand which was made by the letter of February 1, 1950, or by the institution of these proceedings in no way gave rise to the right to recover the sum; the sum was not recoverable by reason of that demand, but was recoverable by reason of the original agreement, which was entered into before March 25, 1949.

It seems clear, therefore, that this is not a case which is covered by the prohibition contained in s. 2 of the Act of 1949. It is also quite clear to me that it is not a case where there is a provision for payment of additional rent; and I agree with the view which has been expressed by my Lord that the covenant for the payment of 30*l.* on November 11 is a personal covenant. It seems to me quite clear that that is what was intended, because of the provision for the whole sum being payable at once by the lessee on the occasion of a consent to assignment. It appears also to be quite clear that it is not a covenant which would run with the land in the hands of the assignee. For those reasons it seems to me that this payment cannot be rent, but is what it is called—an instalment of a premium.

I agree, accordingly, that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Partridge, Moss & Co., Twickenham; Theodore Goddard & Co.*

C. G. M.

PERROTT (J. F.) & CO. LD. v. COHEN.

C. A.

1950
Oct. 11, 12.

Somervell, Cohen and Denning, L.JJ.

Landlord and tenant—Lease—Encroachment—Tenant's occupation of landlord's land adjoining demised premises—Occupation as tenant with acquiescence of landlord—Tenant's liability for repairs in respect of adjoining land.

A tenant of premises under a lease from 1936 to 1948 entered into occupation of land of the landlords, on which there were lavatories, which adjoined the demised premises. This was discovered by the landlords who, in 1943, by their solicitor protested. The tenant claimed that the land was included in the lease. The landlords' solicitor (who had repudiated the claim and proposed that the landlords and tenant should come to some arrangement about the future use of lavatories on the land) asked the tenant to withdraw his claim and said that when he was in a position to make any proposition with regard to the lavatories he would communicate with the tenant. The solicitor did not make any such proposition, the tenant did not withdraw his claim, and he continued in occupation of the land with the lavatories for five years until the end of the lease. At the termination of the tenancy the landlords claimed for repairs to the lavatories on the land as being subject to the tenant's covenants for repair contained in the lease:—

Held, following *Tabor* v. *Godfrey* (1895) 64 L. J. (Q. B.) 245, as explained by the Divisional Court in *Lord Hastings* v. *Saddler* (1898) 79 L. T. 355, that the tenant could not deny that the land was included in his lease and he was therefore liable under his covenant to repair the lavatories.

Per Denning, L.J. The principle underlying cases on encroachment, though not, perhaps, strictly an estoppel is akin to it. If a tenant takes possession of property adjoining the demised premises and by his conduct represents that he is holding it under the demise, then if the landlord acts on that representation by allowing the tenant to remain in possession, the tenant cannot afterwards assert that he is holding the property on any other footing. The representation of the tenant, here, was equivalent to an assurance that the terms of the lease should apply to the piece of land, adjoining the demised premises, of which the tenant was in possession and was binding on him, on the principle which he, his Lordship, had endeavoured to state in *Central London Property Trust Ld.* v. *High Trees House Ld.* [1947] K. B. 130.

Decision of Birkett, J., affirmed.

APPEAL from Birkett, J.

The defendant was the plaintiff company's tenant of a messuage or tenement, garages, warehouse, offices and part use of yard with coachhouse known as "The Cottage", Size Yard, Whitechapel, under a lease dated August 5, 1936, for the term of twelve years (less one day) at the yearly rent of 200*l*. The lease was determined by effluxion of time on June 23, 1948.

The landlords' claim for dilapidations under the covenants for repair in the lease included items for the cost of repairs to certain lavatories. Those lavatories were on land which adjoined the premises let to the tenant, but the land was not included in his lease. On August 12, 1943, it having come to the notice of the landlords that the tenant was occupying the land with the lavatories and claimed that it had been let to him by his lease, their solicitor wrote to the tenant repudiating that claim in express terms, and stating that the landlords were quite prepared to come to some arrangement with the tenant with reference to the future use of the lavatories and that the question of the future use of the lavatories must be settled at once and the term reduced into writing. Further, they asked the tenant to withdraw his claim. The tenant on August 18, 1943, replied under the name of a company which he had formed: "When the premises at Size Yard "were leased to Mr. Henry Cohen, the lavatories in question were "definitely included, and not until a week or so ago has Mr. "Farringdon" (the secretary of the plaintiff company) "presumably on behalf of Messrs. J. F. Perrott & Co., verbally "disputed our claim to them". They stated that the lavatories had been whitewashed; that they had the keys and that the landlord's secretary, Mr. Farringdon, had been permitted to use one of the lavatories. The landlords' solicitor replied that, when he was in a position to make any proposition with regard to the lavatories, he would communicate with the tenant. The tenant and the employees of his company continued to use the lavatories and there was no change in the position until the lease terminated on June 23, 1948. At the trial a Mr. Barry, who gave evidence for the defendant, said that the use of the lavatories by the defendant was an arrangement subsequent to the lease and later admitted that he had asserted that the lavatories were included in the lease.

Birkett, J., held that the lavatories were deemed to be included in the lease, basing his view on the equitable principle stated in *Berry* v. *Berry* (1), and he gave judgment for the landlords for 114*l.*, a sum which included certain dilapidations in respect of the lavatories. He dismissed a counterclaim by the tenant for 8*l.* 6*s.* alleged to have been expended by him on work for which the landlords were liable. The tenant appealed.

Wooll, K.C., and *H. Lester* for the tenant [on the issue whether the land containing the lavatories was to be considered as included in the lease]. The land on which these lavatories stood was not included in the demise. No doubt, in 1943, the tenant claimed that this land was included in the demise; but

(1) [1929] 2 K. B. 316.

the landlords rejected that claim and have never acquiesced in it. That fact distinguishes this case from *Tabor* v. *Godfrey* (2), on which the landlords rely. The tenant is in no way prevented from relying on the fact that the land, on which were the lavatories, was not included in the lease. Where the landlord knows of the encroachment and declines to recognize it, the land occupied will not be treated as part of the demised premises. [Foa's General Law of Landlord and Tenant (7th ed.), at p. 769, was referred to.]

Elwes, K.C., and *Dennis Thompson* for the landlords. The landlords prefer to rest their case on *Tabor* v. *Godfrey* (3) rather than on the equitable principle stated in *Berry* v. *Berry* (4), on which the judge at the trial relied. It was decided in *Tabor* v. *Godfrey* (5) that, where a landlord allowed a tenant to occupy land adjoining the property demised and by his conduct represented to the tenant that the land was included in the demise and the tenant acted on that representation by his use of the land, the landlord could not afterwards change his position and eject the tenant from that land during the term of the lease. This case raises the converse position, where the tenant has taken possession of land adjoining the demised property and by his conduct has represented that he is holding it under the demise. In that case if, as here, the landlord acts on that representation by allowing the tenant to remain in possession, the tenant cannot withdraw from the position that he has adopted. For five years the landlords let the tenant and the employees of his company use these lavatories. As appears from the correspondence, the tenant had whitewashed them. *Tabor* v. *Godfrey* (5) was explained in *Hastings (Lord)* v. *Saddler* (6).

Wooll, K.C., replied.

SOMERVELL, L.J. [after stating the facts]: These lavatories, it is clear, were not included in the lease. The judge at the trial held that they were to be treated as included, basing himself on the equitable principle laid down in *Berry* v. *Berry* (7). Mr. Elwes cited, as more relevant to his submission, *Tabor* v. *Godfrey* (8), where Charles, J., laid down this principle: "The principle is "that a man who gets in by reason of being tenant must take land "as under his original take. . . . The principle is that he comes in "and has it as part of his take, and although the lease excludes "it, yet by the way in which the landlord has permitted him to

---

(2) (1895) 64 L. J. (Q. B.) 245.
(3) 64 L. J. (Q. B.) 245.
(4) [1929] 2 K. B. 316.
(5) 64 L. J. (Q. B.) 245.
(6) (1898) 79 L. T. 355.
(7) [1929] 2 K. B. 316.
(8) 64 L. J. (Q. B.) 245, 247.

C. A.
1950

PERROTT (J. F.) & CO. LD. v. COHEN.

Somervell, L.J.

"occupy, the encroachment must be taken as included in the "demise". I need not go into the facts, but there the defendant had occupied land which was not included in the original demise, though it was adjoining the land demised. Charles, J., said: "From first to last the lessee of No. 40 has occupied the strip "just as if it were included in the demise, and so also the inside "of the wall. Mr. Daldy says it is no matter, as twelve years "have not elapsed. But I think twelve years have elapsed of "occupation of this strip of land inconsistent with the user of it "as a right of way; and I should, apart from the legal question "here, have to hold, certainly as to the strip, that the defendant "had acquired a right to the freehold under the statute. But "that is not the true inference, nor do I think the Statute of "Limitations has anything to do with the case. But I do think "that in the events which have happened, both the landlord "and the tenant have treated this strip as part of the land "demised".

On the evidence in the case before the court, the trial judge would have been justified in coming to the conclusion, and I think that if we had tried it we should have come to the conclusion, that from the beginning, on the evidence, both the landlords and the tenant treated these lavatories as part of the land demised. Mr. Wooll has said, I think rightly, that there is nothing in *Tabor* v. *Godfrey* (8) which corresponds to the letter of protest written on behalf of the landlords, and that it is for that reason that the problem is difficult; but I think that, having regard to the complete acquiescence after 1943 in the de facto position, the only possible conclusion is that the lavatories have been occupied throughout by the defendant as if they were part of the property demised. The attention of the landlords was drawn to the question, and it is true that their solicitor wrote a letter claiming that the lavatories were not included in the lease; but that is all he did; and, there having been a short exchange of correspondence, he left the matter exactly where it was. That being so, it is right to treat the lavatories as part of the demised premises; and the tenant—who of course at one time wanted the lavatories so treated—cannot now adopt the other position and say: "Although I have occupied them, although "I have treated them as part of the demised premises as against "my landlords when their solicitor suggested they were not part "of the demised premises, I shall now change my position and "claim that they were not included in the demise".

For these reasons I think the question in regard to the lavatories was rightly decided by the judge.

---

(8) 64 L. J. (Q. B.) 245.

Cohen, L.J. I am of the same opinion. At one time I felt great doubt on the question of the lavatories. My doubt was whether the equitable principle on which the judge arrived at his decision was really applicable to the facts as he found them. Fortunately I am not compelled to reach a conclusion on that point because Mr. Elwes called our attention to *Tabor* v. *Godfrey* (8), which was explained in *Hastings* (*Lord*) v. *Saddler* (9). As thus explained, *Tabor's* case (8) seems to amount to this: that where a tenant has occupied land of the landlord's not included in the demised premises, according to the terms of the demise, but adjoining them, and, after the tenancy has determined, the landlord seeks to eject his former tenant therefrom, but the tenant relies on the Statute of Limitations, the proper question for the judge to put to the jury, or to decide himself if there is no jury, is: " Do you think the land was occupied by the tenant " as a mere extension of the locus of his tenancy? If you do, " you should find a verdict for the landlord. If you think the " tenant took possession not as a tenant, but with the object or " desire simply of benefiting himself and so as to acquire the " ownership of the land occupied under the Statute of Limitations, you should find for the tenant " (10).

If that be so, it seems to me that, on the facts of this case, the proper conclusion must be that the tenant was purporting to occupy the lavatories as part of the demised premises; he says so in his letter of August 18, 1943; and though it is true, as my Lord has pointed out, that his right to do so was disputed in writing by the solicitor for the landlords, none the less, it is common ground that he continued to occupy the lavatories in exactly the same way as before, allowing the secretary of the landlords to use one of the lavatories down to the end of the tenancy. In those circumstances it seems to me that the only proper answer to the question is that the occupation of the defendant was on the basis that the lavatories were part of the demised premises.

For these reasons, as well as for the reasons given by my Lord, I think that the decision of the judge was right on all points and that the appeal should be dismissed.

Denning, L.J. I fully agree with the judgment of Somervell, L.J., and I too only wish to say a few words on the question of the lavatories. It raises a question which has not hitherto been before this court, and it is this: if a tenant encroaches upon property of the lessor which adjoins the demised premises, does the tenant become liable to repair the property on which he has encroached, just as if it were included under the covenants to repair contained in the lease?

---

(8) 64 L. J. (Q. B.) 245.
(9) 79 L. T. 355.
(10) 79 L. T. 356.

The principle underlying the cases on encroachment is not perhaps strictly an estoppel, but it is akin to it. If a tenant takes possession of adjoining property and by his conduct represents that he is holding it under the demise, then, if the landlord acts on that representation by allowing the tenant to remain in possession, the tenant cannot afterwards assert that he is holding it on any other footing. The tenant cannot, for instance, claim that he is holding it adversely to the landlord so as to acquire a title under the Limitation Act of 1939; nor can he claim that he is only a licensee, who has all the benefits of occupation but none of the burdens of the lease. The reason is not because of any doctrine of "blowing hot and cold"; for that, as Lord Atkin once said, is merely a descriptive phrase which does not express any precise legal concept: see *Lissenden* v. *C. A. V. Bosch Ld.* (11). The reason is because the tenant has by his conduct made a representation that was intended to be binding, was intended to be acted on, and was in fact acted on; and he cannot be allowed to go back on it. The representation was an assertion which was equivalent to a promise or assurance that the terms of the lease should apply to the adjoining piece of land of which he was in possession and is binding on the principle which I endeavoured to state in *Central London Property Trust Ld.* v. *High Trees House Ld.* (12). Conversely, if a landlord should allow a tenant to occupy adjoining property, and by his conduct represents to the tenant that it is included in the demise, and the tenant acts on it by using it as such, the landlord cannot afterwards turn round and eject the tenant from it during the term of the lease. That was decided in *Tabor* v. *Godfrey* (13). Mr. Wooll, for the tenant, has said that there was no consensus ad idem because the landlords wrote a letter showing they did not agree to the use of the lavatories by the tenant; and that therefore there was no contract between them; but the answer to that argument is that it does not lie in the tenant's mouth to say it. He has successfully asserted all these years that the lavatories were included in the lease and he cannot now be allowed to go back on it. I know that this looks like treating an estoppel, almost, as if it were a cause of action, but it is habitually done in cases of waiver: see *Rickards (Charles) Ld.* v. *Oppenheim* (14); and I see no reason why we should not do the same here.

(11) [1940] A. C. 412, 429.
(12) [1947] K. B. 130.
(13) 64 L. J. (Q. B.) 245.
(14) [1950] 1 K. B. 616, 623.

Applying these principles to this case I agree that these lavatories should be treated as part of the demised premises and that the tenant is liable in damages for not repairing them. I agree therefore that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *A. Bieber & Bieber; Waterhouse & Co.*

C. G. M.

REX *v.* NORTHUMBERLAND COMPENSATION APPEAL TRIBUNAL; *Ex parte* SHAW.

1950
Dec. 12, 13, 14.

Lord Goddard, C.J., Hilbery and Parker, JJ.

Certiorari — Extent of remedy — Whether confined to matters of jurisdiction—Inferior tribunal—Order bad in law on its face—"Speaking order"—Court's jurisdiction to interfere.

The Divisional Court has jurisdiction to quash by certiorari the decision of an inferior tribunal where the latter has embodied the reasons for its decision in its order—has made a "speaking order"—and those reasons are bad in law. Certiorari is not a remedy which can be granted only where an inferior tribunal has acted without or in excess of its jurisdiction.

Racecourse Betting Control Board v. *Secretary of State for Air* [1944] Ch. 114, not followed.

Walsall Overseers v. *London and North Western Railway Co.* (1878) 4 App. Cas. 30, and *Rex* v. *Nat Bell Liquors Ld.* [1922] 2 A. C. 128, applied.

Where a decision of the Court of Appeal is inconsistent with an earlier decision of the House of Lords which was not cited to the Court of Appeal it is the duty of the Divisional Court to follow the decision of the House of Lords.

Young v. *Bristol Aeroplane Co. Ld.* [1944] K. B. 718, applied.

APPLICATION for an order of certiorari.

The applicant Thomas Shaw sought an order of certiorari for the quashing of a decision reached by the respondents, the Northumberland Compensation Appeal Tribunal, on June 14, 1950, dismissing an appeal by the applicant against an award to him of compensation for loss of his employment as clerk to the West Northumberland Joint Hospital Board payable under the National Health Service (Transfer of Officers and Compensation) Regulations, 1948.

The applicant, who was clerk to Gosforth Urban District Council, was also appointed clerk to the West Northumberland

1950

Rex
v.
Northumberland
Compensation
Appeal
Tribunal.
Ex parte
Shaw.

Joint Hospital Board on October 7, 1936, and held that appointment until March 31, 1949, when the employment ceased in consequence of the passing of the National Health Service Act, 1946.

The urban district council awarded the applicant compensation for the loss of his employment as clerk to the board on the basis of his service from October 7, 1936, to March 31, 1949, viz., 63*l.* a year until 1961 and 33*l.* a year in respect of his accrued pension rights thereafter. He contended that the whole of his local government service should have been taken into account, and so appealed from that award to the tribunal. The tribunal had the function of determining the compensation payable to, among others, officers of hospital boards who lost their employment by reason of the transfer of hospitals to the Minister of Health under the National Health Service Act, 1946.

On June 14, 1950, the tribunal dismissed that appeal by an award or determination which was set out in a document which stated the facts, the contentions of the council and how they arrived at the sums awarded by them, and that the tribunal agreed with those figures.

The applicant made the present application to the Divisional Court on the ground that the tribunal were in error in computing the compensation to which he was entitled on the basis of his service only as an officer of the board. He also sought an order of mandamus directing the tribunal to hear and determine his application according to law.

It was conceded on behalf of the urban district council that the figure of 33*l.* a year in respect of accrued pension rights was wrong, and the court held that the compensation of 63*l.* a year until 1961 was also wrongly calculated under the regulations of 1948. It was necessary in calculating that compensation, as the applicant contended, to take into account his entire local government service.

This case is reported only on the question whether, that being so, the court had jurisdiction to quash the award of the tribunal or to order the tribunal to make a new award on the proper basis.

Maurice Lyell for the applicant. The award of the tribunal was wrong on its face. The applicant is entitled to an order of certiorari quashing the decision of the tribunal, and to an order of mandamus directed to them ordering them to make a proper award.

J. P. Ashworth for the tribunal. The applicant is not entitled to an order of mandamus because the tribunal have not declined jurisdiction: *Rex* v. *Licensing Authority for Goods Vehicles for the Metropolitan Area; Ex parte B. E. Barrett Ld.* (1). They have exercised their jurisdiction although they have done so wrongly. There can be no question of mandamus issuing unless and until their decision is set aside, and then it will issue only if they then decline to exercise their jurisdiction and to make another award.

---

(1) [1949] 2 K. B. 17.

As regards the question of certiorari it is the established practice of the court that certiorari will issue only where an inferior court has acted without jurisdiction or has exceeded its jurisdiction. In *Rex* v. *Paddington and St. Marylebone Rent Tribunal; Ex parte Bell London and Provincial Properties Ld.* (2), Sir Valentine Holmes argued (3) that a tribunal " had chosen to " make what had been called by the House of Lords ' speaking " ' orders ', and had given in their decision reasons which were " clearly wrong in law, and certiorari would accordingly lie to " quash the orders: see *Racecourse Betting Control Board* v. " *Secretary of State for Air* (4); *Rex* v. *Nat Bell Liquors Ld.* (5); " Halsbury's Laws of England, 2nd ed., vol. 9, p. 888, " para. 1493 ". But the court did not then give any decision on that point (6).

It is quite clear from *Racecourse Betting Control Board* v. *Secretary of State for Air* (4), that certiorari will not lie on the ground merely that an inferior court have made an error of law, even though that error be apparent on the face of the record. [Counsel referred to *Rex* v. *Paddington and St. Marylebone Furnished Houses Rent Tribunal; Ex parte Kendal Hotels Ld.* (7).]

[PARKER, J. The term "speaking order" appears to have originated in *Walsall Overseers* v. *London and North Western Ry. Co.* (8). Does that case not show that certiorari will issue if the record of an inferior court is bad on its face?]

[LORD GODDARD, C.J. It appears that that case was not cited to the Court of Appeal in *Racecourse Betting Control Board* v. *Secretary of State for Air* (9).]

It is conceded that the *Walsall* case (8), was not cited in the later cases. But the Divisional Court has long adopted the practice that it will interfere with decisions of inferior tribunals only if they have misconducted themselves or exceeded their jurisdiction, and that it will not interfere even in the case of a manifest error of law on the face of an order of the inferior tribunal. It is conceded that the order of the tribunal in the present case was a "speaking" order. The issue before the House of Lords in the *Walsall* case (8), was of a limited nature.

(2) [1949] 1 K. B. 666.
(3) Ibid. 670.
(4) [1944] Ch. 114.
(5) [1922] 2 A. C. 128, 154.
(6) [1949] 1 K. B. 666, 683.
(7) (1947) 63 T. L. R. 239.
(8) (1878) 4 App. Cas. 30.
(9) [1944] Ch. 114.

1950

REX v. NORTHUMBERLAND COMPENSATION APPEAL TRIBUNAL. *Ex parte* SHAW.

[LORD GODDARD, C.J., referred to *Riceslip Parish* v. *Henden Parish* (10).]

[Counsel referred to *Rex* v. *Nat Bell Liquors Ld.* (11), and *Rex* v. *Minister of Health* (12).]

[With regard to the question of mandamus counsel referred also to *Rex* v. *Port of London Authority; Ex parte Kynoch Ld.* (13); *Reg.* v. *Cotham* (14) and *Rex* v. *Monmouthshire Justices* (15).]

Harold Williams, K.C., and *Mattar* for the district council. On the question whether certiorari is available the attention of the court must be drawn to *Rex* v. *Westminster Assessment Committee; Ex parte Junior Carlton Club* (16), and *Rex* v. *Westminster Assessment Committee; Ex parte St. James' Court Estate Ld.* (17).

Lyell in reply. The remedy of certiorari has fallen into disuse except in cases where a tribunal has exceeded its jurisdiction only because the Summary Jurisdiction Act, 1848, took away all possibility of certiorari being directed to courts of summary jurisdiction for error on the face of the record: see per Lord Penzance in *Walsall Overseers* v. *London and North Western Ry. Co.* (18). That decision of the House of Lords remains good law and is relied on. It is conceded that if *Racecourse Betting Control Board* v. *Secretary of State for Air* (19), was rightly decided certiorari will not issue. But the *Walsall* case (20), was not cited to the Court of Appeal in the latter case. The Divisional Court is bound to follow the decision of the House of Lords: see *Young* v. *Bristol Aeroplane Co. Ld.* (21)

Dec. 14. LORD GODDARD, C.J., delivered the following judgment:—In this case a point of the very greatest importance, and one which has necessitated the examination of a large number of cases and consideration of the principles which apply to the doctrine of certiorari, has been argued. Certiorari, as has often been pointed out in this court, is a remedy of a very special character. In most cases it is moved and granted on questions as to whether or not an inferior court or tribunal has jurisdiction. It never goes to a superior court, but an order of certiorari will be made where it is shown that an inferior court has either no jurisdiction in a particular matter or has exceeded its jurisdiction. The object of the old writ of certiorari, which has now been replaced by an order of certiorari—that is merely a procedural change—was to call up into this court the proceedings of and the order which had been made in the lower court in order that they should be examined.'

---

(10) (1699) 5 Mod. 416.
(11) [1922] 2 A. C. 128.
(12) [1939] 1 K. B. 232.
(13) [1919] 1 K. B. 176.
(14) [1898] 1 Q. B. 802.
(15) (1913) 109 L. T. 788.
(16) [1940] 3 All E. R. 155.
(17) (1940) 85 S. J. 46.
(18) 4 App. Cas. 30.
(19) [1944] Ch. 114.
(20) 4 App. Cas. 30.
(21) [1944] K. B. 718.

Certiorari did not issue, or seldom issued, to a court of record. In former days the procedure in that case was by writ of error, and where a writ of error was granted the whole record was brought up to the Court of King's Bench and that court would examine the record and would only decide for the applicant if error appeared upon the record. It was for that reason that a writ of error was such an unsatisfactory remedy in a criminal case. Only the record was brought up. That record consisted of the commission of assize—showing the appointment of the judges, the holding of the court, the precepts of the sheriffs, the names of the grand jurors, and the finding of the indictment—a record of the petty jurors, any special plea that might have been made, such as a plea in bar, the verdict recorded and the judgment of the court. Nothing was shown on the record as to the evidence which was admitted or the charge which was given to the jury. If there had been a completely wrong charge given by the judge on a point of law—what we should call misdirection—or the wrongful admission of evidence, that could not be examined on a writ of error, because it did not appear on the record.

With regard to the proceedings of courts not of record the writ of certiorari would bring up to the Court of King's Bench the proceedings in and the order of the lower court, and such orders have differed from time to time by reason of different statutory provisions—more particularly so in the case of proceedings before justices. Before the procedural changes wrought by the Summary Jurisdiction Act, 1848, commonly called Jervis's Act, all proceedings before justices had to be set out at great length, with their certificates of conviction; the simple forms of convictions which are now common were substituted by the Summary Jurisdiction Act. I am emphasizing this point because it will be seen from cases which we have to examine that the question as to how far this court can inquire by certiorari into the correctness of a decision, as distinct from the jurisdiction of the court which made it, depends on the contents of the documents, as I believe, which are brought up and laid before this court. For instance, if leave to apply for an order of certiorari were now granted to bring into this court a conviction by justices, say, for some simple offence, only the charge, the conviction, and the sentence would be brought up. I think it was very likely that in the year 1848, when Sir John Jervis introduced his Bill into Parliament, that one of the matters which moved him to do so, and moved Parliament to pass the Act, was that until then all sorts of objections could be taken on certiorari on account of the very full statements which used to be brought up on conviction.

Many statutes took away certiorari in respect of the matters with which those statutes dealt, but that certiorari was taken away never debarred the court from granting certiorari if a question of jurisdiction arose; the justices or inferior tribunal could not give themselves jurisdiction, and if they had purported to give themselves jurisdiction which they had not, certiorari would lie to quash their order, because they had no jurisdiction to make it. The taking away of certiorari by statute prevented the Court of King's Bench, no doubt, from inquiring into what I may call the merits of the determination. That power was taken away and the decision of the inferior court was to be regarded as final on its merits. But that did not prevent the court of King's Bench from inquiring whether or not the inferior court had any jurisdiction to make the order at all. I think that is the explanation why one finds many instances in the books where, although by a statute such decision was not to be removed into any court by writ of certiorari or otherwise, certiorari has been granted in respect of that very matter, but only on the ground of want of jurisdiction.

Counsel for the tribunal has contended that this court has no power to examine the order in the present case on certiorari, on the ground that certiorari goes only to defect of jurisdiction, and he relied specially on *Racecourse Betting Control Board* v. *Secretary of State for Air* (22), a decision of the Court of Appeal which certainly creates difficulty in this court. I can discuss that case perhaps a little more frankly because I was one of the members of the Court of Appeal which decided it. It was the case of a motion in the Chancery Division to set aside an award of the General Claims Tribunal.

Lord Greene, M.R., in giving judgment in the Court of Appeal said (23): " It was said that the jurisdiction to set aside " the award of an arbitrator for error of law appearing on its " face is one that exists at common law independently of the " Arbitration Acts. It was also said that the jurisdiction is not " confined to consensual arbitrations, but extends to arbitrations " under statutes. Both these propositions are unquestionably " correct: see, e.g., as to the former, *Hodgkinson* v. *Fernie* (24), " and, as to the latter, *In re Jones and Carter's Arbitration* (25). " The next and vital proposition is, however, one which, in my " opinion, cannot be supported either on principle or on authority. " It was that the jurisdiction is not confined to the case of awards " of arbitrators, but extends to the decisions of every form of

---

(22) [1944] Ch. 114.

(23) Ibid. 119.

(24) (1857) 3 C. B. (N.S.) 189.

(25) [1922] 2 Ch. 599.

"inferior tribunal, and, accordingly, when the legislature establishes a special tribunal, whether or not it can be described as an "arbitral tribunal, the court can set aside a decision given by it "if an error of law appears on its face. This jurisdiction was "said to exist quite independently of the old procedure by way "of writ of error. No authority was quoted in support of this "proposition, and, in my opinion, it is wrong in principle. In "the case of an inferior court, if it acts beyond its jurisdiction, "the remedy is by certiorari. If, acting within its jurisdiction, it "makes an error in law, the remedy is by appeal (if the decision "is appealable), and that whether or not the error appears on the "face of the decision. In the case of new tribunals set up under "statute no appeal will lie unless the right of appeal is conferred "expressly or impliedly by statute, and, accordingly, where, as "in the present case, no right of appeal is given, their decisions "are not appealable". He then considered cases of arbitration, and took the view that the undoubted right of the court to interfere where an error of law appears on the face of an award is an exception to the general rule.

MacKinnon, L.J., in giving judgment, said much the same thing and also treated arbitration as an exception. I did not deal with the matter quite in that way, but I need not now refer to that judgment.

We have to consider whether we are bound by that decision, but it is to be noticed that two cases—one in the House of Lords and one in the Judicial Committee of the Privy Council—were not there cited to the Court of Appeal, and in my opinion if those cases had then been cited to the court the decision must have been contrary to what it was.

In *Walsall Overseers* v. *London and North Western Ry. Co.* (26), Lord Cairns, L.C., reviewed the history of the practice of quarter sessions of taking the opinion of a judge of assize—as they did by the terms of the commission which has been addressed to them since the reign of Edward III when justices were first appointed and courts of quarter sessions were first set up. That commission gave and still gives them authority to hear and determine cases provided that in cases of difficulty they reserve their decision until a judge of assize with whom they can confer has come into the county. But that practice gradually fell into disuse and the practice grew up of consulting the Court of King's Bench by means of a special case. Lord Cairns said: "But supposing that the court of quarter sessions did not "adopt that course, there was still another mode by which any "question of law which appeared to the court of quarter sessions

(26) 4 App. Cas. 30, 40.

" doubtful, might be left open for the exercise of the judgment " of a higher tribunal. All that was necessary was that the court " of quarter sessions, in making its order, should not make it an " unspeaking or unintelligible order, but should, in some way, " state upon the face of the order the elements which had led " to the decision of the court of quarter sessions ". When Lord Cairns, L.C., speaks of an unspeaking or unintelligible order, he obviously means an order which gives no reasons, or does not explain in any way why the court made the order, but simply states that the court made such-and-such a conviction, order for removal or for quashing the poor rate, or other order of that sort, giving no reasons for doing so. It may not be unintelligible in one sense, but it is unintelligible in that it does not tell the superior court why the inferior court made that order.

Lord Cairns, L.C., continued: " If the court of quarter " sessions stated upon the face of the order, by way of recital, " that the facts were so-and-so, and the grounds of its decision " were such as were so stated, then the order became upon the " face of it, a speaking order; and if that which was stated upon " the face of the order, in the opinion of any party, was not such " as to warrant the order, then that party might go to the Court " of Queen's Bench and point to the order as one which told its " own story, and ask the Court of Queen's Bench to remove it by " certiorari, and when so removed to pass judgment upon it, " whether it should or should not be quashed. In that case, as " I said just now, the jurisdiction of the Court of Queen's Bench " was merely a jurisdiction to leave the order standing or to " remove it out of the way. It was not a jurisdiction to substitute for it another or a different order; that would be making " the Court of Queen's Bench, in the ordinary sense of the term, " a court of rehearing or of appeal ".

That passage seems to me to show that on certiorari the Court of Queen's Bench could look at the order and pronounce on it as they could on a writ of error. But it might be that a writ of error did not or might not give the court a very free hand, because they could look only at what was stated on the record; anything, however, that was stated on the record could be examined by the court and they could pass judgment on it. Similarly anything that is stated in the order which an inferior court has made and which has been brought up into this court can be examined by the court, if it be a speaking order, that is to say, an order which sets out the grounds of the decision. If the order is merely a statement of conviction and that there shall be a fine of 40*s*., or an order of removal or quashing a poor rate, there is an end of it, this court cannot examine further. If the inferior court tells this court why it had done what it has and makes it part of its order, this court can examine it.

To the same effect is the speech of Lord Penzance in the *Walsall* case (27). That case was referred to and considered by Lord Sumner in *Rex* v. *Nat Bell Liquors Ld.* (28). He there showed that the law of Canada with regard to certiorari was the same as the law of this country, and considered exhaustively the whole law relating to certiorari. He pointed out that where certiorari was moved on the ground of lack of jurisdiction the court must in many cases have evidence before it to show the lack of jurisdiction. But if, for instance, a court of summary jurisdiction professed to have dealt with a case of burglary, the defect of jurisdiction would appear at once in the order itself; you would need no evidence at all. If, on the other hand, the defect of jurisdiction was one which arose because of the disqualification of a justice, either on the ground of bias or for some other reason, the Divisional Court could not know that, unless evidence was brought before them, and the court would therefore admit evidence by affidavit to show the defect of jurisdiction. Lord Sumner pointed out that if the inferior court was acting within its jurisdiction the superior court could only examine the order, and could not consider evidence to show that the order was come to by some process of reasoning which was incorrect, or by the admission of evidence that was not admissible, or even on the ground that there was no evidence at all, because all those were matters of appeal. He considered the well-known case of *Reg.* v. *Bolton* (29), in which there was a judgment of Lord Denman considering all these matters as they existed in 1841.

Lord Sumner referred also to the speech of Lord Cairns, L.C., in *Walsall Overseers* v. *London and North Western Ry. Co.* (30), and he quoted this passage: " If there was upon the face of the " order of the court of quarter sessions anything which showed " that that order was erroneous, the Court of Queen's Bench " might be asked to have the order brought into it, and to look " at the order, and view it upon the face of it, and if the court " found error upon the face of it, to put an end to its existence " by quashing it ". Lord Sumner continued (31): " [Lord " Cairns] then turned to the kind of order under discussion, and " after stating how much in that matter, both of fact and of law, " the sessions were bound to set out on the face of their order, he " proceeded to point out that the statement of what had led to " the decision of the court made the order ' not an unspeaking " ' or unintelligible order ', but a speaking one, and an order

---

(27) 4 App. Cas. 30, 43.
(28) [1922] 2 A. C. 128.
(29) (1841) 1 Q. B. 66.
(30) 4 App. Cas. 30, 39.
(31) [1922] 2 A. C. 128, 155.

"which on certiorari could be criticized as one which told its own "story, and which for error could accordingly be quashed. It is "to be observed on this passage, that the key of the question is "the amount of material stated or to be stated on the record "returned and brought into the superior court. If justices state "more than they are bound to state, it may, so to speak, be "used against them, and out of their own mouths they may be "condemned, but there is no suggestion that, apart from "questions of jurisdiction, a party may state further matters to "the court, either by new affidavits or by producing anything "that is not on or part of the record". Observe that; he is saying that one cannot produce evidence to supplement that which is on the record; one is confined to that which is on the record.

Lord Sumner continued: "That supervision"—that is, the supervision of the court—"goes to two points: one is the area "of the inferior jurisdiction and the qualifications and conditions "of its exercise; the other is the observance of the law in the "course of its exercise". Later on he said (32): "*Reg.* v. "*Bolton* (33), undoubtedly, is a landmark in the history of "certiorari, for it summarizes in an impeccable form the "principles of its application under the regime created by what "are called Jervis's Acts"—I do not quite understand that, because the first Jervis's Act was not passed until 1848, and *Reg.* v. *Bolton* (33), was decided in 1841—"but it did not change, "nor did those Acts change the general law. When the "Summary Jurisdiction Act provided, as the sufficient record of "all summary convictions, a common form, which did not include "any statement of the evidence for the conviction, it did not "stint the jurisdiction of the Queen's Bench, or alter the actual "law of certiorari. What it did was to disarm its exercise. The "effect was not to make that which had been error, error no "longer, but to remove nearly all opportunity for its detection. "The face of the record 'spoke' no longer: it was the inscrutable "face of a sphinx"—an observation characteristic of Lord Sumner.

That shows exactly, I think, what was the position when the old procedure of drawing up convictions and orders by courts of summary jurisdiction was altered so that one had only the bare decision in the case; it disarmed the exercise of the jurisdiction by certiorari of this court, because this court could look only at that order; they could not go behind it. They could not, for instance, do what Holt, C.J., had done late in the seventeenth century, in *Riceslip Parish* v. *Henden Parish* (34). That was a

(32) Ibid. 159.

(33) 1 Q. B. 66.

(34) 5 Mod. 416, 417.

settlement case in which the whole matter was brought before the Court of King's Bench. Holt, C.J., said: " Where the " justices of peace give a special reason for their settlement, " and the conclusion which they make in point of law will not " warrant the premises, there we will rectify their judgment; " but if they had given no reason at all, then we would not have " travelled into the fact ".

Those two cases, *Walsall Overseers* v. *London and North Western Ry. Co.* (35), and *Rex* v. *Nat Bell Liquors Ld.* (36), were not cited to the Court of Appeal in *Racecourse Betting Control Board* v. *Secretary of State for Air* (37), and it seems to me that in view of the very clear decision of Lord Cairns, L.C., in the *Walsall* case (35), and the equally clear and emphatic statement of the law by Lord Sumner in the *Nat Bell* case (36), that that decision of the Court of Appeal cannot stand.

I am the more convinced of that because I think that when one has read the passages to which I have referred and considered *Riceslip Parish* v. *Henden Parish* (34), in which Holt, C.J., stated the principle, it becomes clear what was puzzling the Court of Appeal in the *Racecourse Betting Control* case (37), namely, why the court interfered in the case of arbitrators. The Court of Appeal treated the interference by the court with arbitration awards for error on their face as an exception to the general rule. I think with all respect—and I do not know that I need say that, as I was a member of the court—that that was wrong. In the case that they cited, *Kent* v. *Elstob* (38), the court had no doubt of its right to interfere in the case where error appeared on the face of an award. They did so, I think, on exactly the same principles which Holt, C.J., applied in *Riceslip Parish* v. *Henden Parish* (39). An award is, generally, a speaking document; it sets out the reasons, and the court therefore has the reasons before it, under the hand of the arbitrator, as to why he came to the decision which he did, and if he has misapplied the law the court corrects him. It is true that Williams, J., in a later case, *Hodgkinson* v. *Fernie* (40), seems to have expressed regret that the court took that course in the case of arbitrations; and in *Hogge* v. *Burgess* (41), Martin, B., said: " According to the old " rule, the decision of an arbitrator, both upon the law and facts, " was conclusive. That rule was broken into by the Court of " King's Bench in the case of *Kent* v. *Elstob* (38) ".

The Court of Appeal drew the inference that for some reason, the origin of which they could not ascertain, awards were put in

(34) 5 Mod. 416, 417.
(35) 4 App. Cas. 30.
(36) [1922] 2 A. C. 128.
(37) [1944] Ch. 114.
(38) (1802) 3 East 18.
(39) 5 Mod. 416, 417.
(40) (1857) 3 C. B. (N.S.) 189, 202.
(41) (1858) 3 H. & N. 293, 296.

1950

REX
v.
NORTHUMBERLAND
COMPENSATION
APPEAL
TRIBUNAL.
Ex parte
SHAW.

Lord Goddard, C.J.

a class by themselves and were an exception to the general rule. In my opinion the reason why Williams, J., expressed regret in *Hodgkinson* v. *Fernie* (40), at the court being able to interfere in the case of awards was a different reason altogether. He thought, as I think with others, and, I believe, with Martin, B., that the rule ought to be that where the parties have chosen to submit both law and fact to an arbitrator, they, having chosen their own tribunal, ought not to be allowed to say that the law which that tribunal has laid down is wrong. I think that that is the regret which Williams, J., expressed in *Hodgkinson* v. *Fernie* (40). He pointed out that courts had allowed awards to be attacked on the ground of corruption on the part of the arbitrator, and he regretted that the courts also allowed, as they had certainly done ever since *Kent* v. *Elstob* (42), the law of the arbitrator to be attacked, because he thought that if a party chose an arbitrator he should be bound by the law which the arbitrator chose to apply. That is very much the same principle which Scrutton, L.J., used often to invoke when cases under the Arbitration Acts came before him. In giving his reasons why the court would not interfere he would say: "Business men "choose to go before other business men, and they go there "because they do not like the law that is administered in this "court or the way that we look at the admission of evidence, or "something of that sort; they like to go before their own "tribunal". I think that is the real reason why Williams, J., expressed the regret which he did in *Hodgkinson* v. *Fernie* (40), and that he was not expressing a regret that an exception had been grafted on to the law. I think that the law with regard to awards is exactly the same as the law laid down by Holt, C.J., in *Riceslip Parish* v. *Henden Parish* (43).

What is the result of that? The result clearly seems to me to be that a court before whom the order in the present case is brought can examine it. The tribunal have told us what they have taken into account, what they have disregarded, and the contentions which they accepted. They have told us their view of the law, and we are of opinion that the construction which they placed on this very complicated set of regulations was wrong.

It is true, as counsel for the tribunal pointed out, that there have been several other cases, principally under the Furnished Houses (Rent Control) Act, 1946, in which the court has refused to grant certiorari, but in none of those cases were there speaking orders, or if there were the court has proceeded in the same error

(40) (1857) 3 C. B. (N.S.) 189, 202.

(42) 3 East 18.

(43) 5 Mod. 416, 417.

into which the Court of Appeal fell in *Racecourse Betting Control Board* v. *Secretary of State for Air* (44).

But are we at liberty to disregard that decision of the Court of Appeal? That, I think, depends on the application of *Young* v. *Bristol Aeroplane Co. Ld.* (45). That case was one in which the Court of Appeal considered how far they were bound by their own decision and laid down the principles on which they could depart from a previous decision of theirs. In giving the judgment of the court, Lord Greene, M.R., who was considering cases where decisions had been given, as he put it, per incuriam, which the court was entitled to disregard, said (46): "Two classes of "decisions per incuriam fall outside the scope of our inquiry, "namely, those where the court has acted in ignorance of a "previous decision of its own or of a court of co-ordinate juris-"diction which covers the case before it—in such a case a "subsequent court must decide which of the two decisions it "ought to follow; and those where it has acted in ignorance of a "decision of the House of Lords which covers the point—in such "a case a subsequent court is bound by the decision of the "House of Lords".

I hope that I have shown that the decision in *Racecourse Betting Control Board* v. *Secretary of State for Air* (47), is inconsistent with that in *Walsall Overseers* v. *London and North Western Ry. Co.* (48), and *Rex* v. *Nat Bell Liquors Ld.* (49). Of course the *Nat Bell* case (49), is not technically binding on the Court of Appeal, because it was a decision of the Judicial Committee of the Privy Council, but it was a case which obviously the Court of Appeal would treat with the utmost respect. Following, as it does, and reinforcing the decision of the House of Lords in the *Walsall* case (48), I have no doubt but that the Court of Appeal would have considered it binding on them. Decisions of the House of Lords are binding on this court, as are decisions of the Court of Appeal, and if we find that a decision of the Court of Appeal is inconsistent with a decision of the House of Lords, in my opinion, and applying the same principles which run through the decision in *Young* v. *Bristol Aeroplane Co. Ld.* (50), we are bound to follow the decision of the House of Lords.

I am confirmed in that view by the speech of Lord Wright in *Noble* v. *Southern Ry. Co.* (51). That was a case in which the Court of Appeal, considering itself bound by its own previous decision in *Clarke* v. *Southern Ry. Co.* (52), had given a decision in a workmen's compensation case with which all the members of the court said they disagreed. I was a member of the court and we said that we did not like the previous decision, we thought it was wrong, but we felt ourselves bound by it because it had never been overruled. It was, to a great extent, inconsistent with some subsequent cases in the House of Lords, but not so inconsistent that it could be said that it had been overruled. But Lord Wright said (51): "What a court should do when "faced with a decision of the Court of Appeal manifestly "inconsistent with the decisions of this House is a problem of "some difficulty in the doctrine of precedent. I incline to think "it should apply the law laid down by this House and refuse to "follow the erroneous decision".

---

(44) [1944] Ch. 114.
(45) [1944] K. B. 718.
(46) At p. 729.
(47) [1944] Ch. 114.
(48) 4 App. Cas. 30.
(49) [1922] 2 A. C. 128.
(50) [1944] K. B. 718.
(51) [1940] A. C. 583, 598

I think that where we have a decision of the House of Lords which says one thing and a decision of the Court of Appeal, in which the decision of the House of Lords was not cited, which says another, our plain duty is to follow the decision of the House of Lords, and that we propose to do. I think it is beneficial in this case that we should do so, not merely having regard to the facts of this case, but because so many tribunals have now been set up, all of whom, I am certain, desire to do their duty in the best way, and are often given very difficult sets of regulations and statutes to construe. It certainly must be for their benefit, and I have no doubt but that they will welcome, that this court should be able to give guidance to them if, in making their orders, they make their orders speaking orders, so that this court can then consider them if they are brought before the court on certiorari.

For these reasons I am of opinion that an order of certiorari should be made and that the award of the tribunal should be quashed.

Counsel for the applicant also moved for mandamus. We do not think it necessary to grant mandamus in this case, because once the order is quashed it follows that the applicant will be able to go back to the appeal tribunal, and counsel for the council has told us that they will welcome an opportunity for the matter to be dealt with in the light of the judgment of this court. Therefore, we see no reason why we should order mandamus to issue, but counsel for the applicant asked us to make it clear that he does not admit that he has no right to mandamus, and it will still be open to him, if necessary, if this case goes further, to apply for an order of mandamus.

---

(51) [1940] A. C. 583, 598.

(52) (1927) 20 B. W. C. C. 309.

1950

REX
v.
NORTHUMBERLAND
COMPENSATION
APPEAL
TRIBUNAL.
Ex parte
SHAW.

Lord Goddard, C.J.

HILBERY, J. I agree.

PARKER, J. I entirely agree.

Order of certiorari.

Solicitors: *Gwylym T. John, Barnstaple; Adam Burn & Son, for Charles S. Perkins, Gosforth; Solicitor, Ministry of Health.*

R. P. C.

SHACKLETON *v.* GREENHALGH.

[Plaint No. S. 371.]

C. A.

1950
Nov. 24.

Somervell, Jenkins and Birkett, L.JJ.

Landlord and tenant—Rent restriction—Sub-letting with sharing agreement—Sub-tenant's limited protection—Premises vacated by tenant—Position of sub-tenant—Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 34)*—Landlord and Tenant (Rent Control) Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *ss.* 7, 9.

The tenant of a house within the Rent Restriction Acts sub-let part of the house to the defendant, the kitchen and other essential parts of the house being shared by the two parties to the sub-letting agreement. The tenant having given up possession, the landlord sought possession of the house from the sub-tenant, who claimed the protection of the Rent Restriction Acts.

The county court judge refused to grant an order for possession, holding that s. 9 of the Landlord and Tenant (Rent Control) Act, 1949, gave the defendant a protected tenancy under the Rent Restriction Acts. On appeal by the landlord:—

Held, that although s. 9 was intended to protect the tenant and sub-tenant as against the tenant's landlord where there had been sub-lettings which otherwise would not have been within the protection of the Rent Restriction Acts, it did not follow and could not be said that the sub-tenant was still protected by that section when the tenant had quitted. The most that he could claim was protection under s. 7 as having become a tenant of the landlord sharing accommodation with him, and that section did not confer the protection of the Rent Restriction Acts on such a tenant.

APPEAL from Judge Harrison, sitting at Southport county court.

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

C. A.
1950

SHACKLETON
v.
GREENHALGH.

A house within the Rent Restriction Acts was let at a rent of 1*l.* a week to a tenant who was in 1948 given notice to quit. At or about the same time as this notice was given the tenant sub-let part of the house to the defendant, the kitchen and other essential parts of the house being shared by the tenant and sub-tenant.

On February 16, 1950, the tenant gave up possession, whereupon the landlord brought an action for possession against the sub-tenant.

The county court judge refused an order for possession, holding that s. 9 of the Landlord and Tenant (Rent Control) Act, 1949 (1), gave the defendant a protected tenancy under the Rent Restriction Acts. The plaintiff appealed.

J. M. Davies for the plaintiff. The county court judge was wrong in holding that s. 9 of the Landlord and Tenant (Rent Control) Act, 1949, afforded the sub-tenant the protection of the Rent Restriction Acts. That section does no more than reverse the law as laid down by the Court of Appeal in *Turner* v. *Baker* (2). It protects a tenant as against his landlord but does not protect a sub-tenant as against the tenant or as against the head landlord. Section 15, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, does not assist the defendant, for, now, the defendant by virtue of that sub-section is sharing the accommodation with the landlord—for those were the terms upon which he held from the tenant. Consequently,

---

(1) Landlord and Tenant (Rent Control) Act, 1949, s. 7: "Where "under any contract—(*a*) a tenant "has the exclusive occupation of any "accommodation, (*b*) the terms on "which he holds the accommodation "include the use of other accommoda- "tion in common with his landlord or "with his landlord and other persons, "and (*c*) by reason only of the cir- "cumstances mentioned in para- "graph (*b*) of this section, the accom- "modation referred to in paragraph "(*a*) thereof is not a dwelling-house "to which the principal Acts apply, "the Act of 1946 shall apply to the "contract notwithstanding that the "rent does not include payment for "the use of furniture or for services".

Section 9: "Where the tenant of "any premises, being a house or part "of a house, has sub-let a part, but "not the whole of the premises, then "as against his landlord or any "superior landlord (but without pre- "judice to the rights against and "liabilities to each other of the tenant "and any person claiming under him, "or of any two such persons) no part "of the premises shall be treated as "not being a dwelling-house to which "the principal Acts apply by reason "only: (*a*) that the terms on which "any person claiming under the "tenant holds any part of the pre- "mises include the use of accommoda- "tion with other persons, or (*b*) that "part of the premises is let to any "such person at such a rent as is "mentioned in proviso (i) to sub- "section (2) of section twelve of the "Increase of Rent and Mortgage "Interest (Restrictions) Act, 1920 "(which relates to furnished let- "tings)".

(2) [1949] 1 K. B. 605; [1950] A. C. 401.

s. 7 of the Act of 1949 applies and this affords not the protection of the Rent Restriction Acts but only the lesser protection granted by the Furnished Houses (Rent Control) Act, 1946.

If it be now said that the defendant has a protected tenancy as against the landlord, this would mean that s. 15, sub-s. 3, of the Act of 1920, had operated to convert an unprotected tenancy into a protected tenancy. This cannot be for the section was not meant to enlarge the estate of the tenant. [He also referred to *Neale* v. *Del Soto* (3); *Kenyon* v. *Walker*, *Stevenson* v. *Kenyon* (4).]

Peter Bristow for the defendant. The defendant has a protected tenancy by virtue of s. 9 of the Act of 1949. That section is concerned amongst other things with a sub-letting as between tenant and sub-tenant which but for the section might be outside the protection of the Rent Restriction Acts. It embraces (a) sharing accommodation; (b) a furnished sub-letting.

Although probably the primary object of the section was to protect tenants affected by the decision of the Court of Appeal in *Turner* v. *Baker* (5), the wording of the section is equally apt to protect a sub-tenant where the tenant has gone out of possession. Section 7 is inapplicable in the present case for that section relates to an existing contractual tenancy between landlord and tenant where the tenant shares accommodation with the landlord. But for that section the tenant would be unprotected, since he would not be occupying a separate dwelling-house within the meaning of the Acts: see *Neale* v. *Del Soto* (6).

The protection given to a sub-tenant under s. 9 cannot be simply the protection afforded by s. 7 for s. 9 by implication refers to the protection of the Rent Restriction Acts. Further, the section embraces a wider class of person than s. 7 since it includes landlord, tenant and sub-tenant; and paragraph (*b*) of s. 9 relates to furnished lettings and is not concerned at all with the question of sharing accommodation. [He also referred to *Banks* v. *Cope Brown* (7) and *Barrell* v. *Fordree* (8).]

SOMERVELL, L.J., stated the facts and continued: I will first consider the position on the authorities before the Landlord and Tenant (Rent Control) Act, 1949, was passed with regard to the question of sharing. In *Neale* v. *Del Soto* (9), a tenant was granted a lease of two unfurnished rooms in a seven-roomed house, with the use jointly with the landlord of the garage, kitchen, bathroom, lavatory, coal-house, and conservatory. It

(3) [1945] K. B. 144.
(4) [1946] 2 All E. R. 595.
(5) [1949] 1 K. B. 605.
(6) [1945] K. B. 144.
(7) [1948] 2 K. B. 287.
(8) [1932] A. C. 676.
(9) [1945] K. B. 144.

was held that, as that amounted to a sharing of the house notwithstanding that each party had exclusive use of some rooms, the letting was not a letting of a separate dwelling-house within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. Therefore, as between landlord and tenant the protection of the Act could not be claimed by the tenant.

That principle was extended in *Banks* v. *Cope Brown* (10) to a case where the landlord was not one of the sharers but let the premises to two or more tenants, each tenant no doubt having exclusive possession of some rooms, but the tenants sharing between them certain essential rooms. Then in *Turner* v. *Baker* (11) this court decided that a tenant who sub-let a furnished bed-sitting room and allowed the sub-tenant to share the use of the kitchen with her, herself lost the protection of the Rent Restriction Acts. That carried the matter a stage further, for all that had previously been decided was that a sub-tenant who had a sharing agreement in respect of essential rooms was not protected. The decision in this court of *Turner* v. *Baker* was subsequently reversed by the House of Lords (12), but at the time when the Act of 1949 was passed the House of Lords had not given their decision. In *Barrell* v. *Fordree* (13), a tenant had created a furnished sub-tenancy. It seems clear that circumstances had arisen in which, but for the protection given by the Rent Restriction Acts, the landlord could have obtained an order for possession in respect of the whole of the premises against the tenant. That, of course, would have brought the tenancy to an end, and the sub-tenancy, being furnished, would not have been protected. The House of Lords decided that, although the tenant was entitled to claim the protection of the Act in respect of the rooms which she occupied, the landlord could recover possession of those which had been sub-let furnished.

In that state of the law the Act of 1949 was passed. Section 7 covers the position as between tenant and immediate landlord.

[His Lordship read the section.] The Furnished Houses (Rent Control) Act, 1946, there referred to set up tribunals to which furnished lettings might be referred. Such lettings are not within the Rent Restriction Acts. Application may be made by the tenant for a reduction in his rent; and the tribunal have power by s. 5 to protect a tenant in possession for three months from the date of their decision. What is noticeable is that the legislature quite plainly did not meet this problem in s. 7 of the Act of 1949 by giving the sharing tenant the protection

(10) [1948] 2 K. B. 287.
(11) [1949] 1 K. B. 605.
(12) [1950] A. C. 401.
(13) [1932] A. C. 676.

of the Rent Restriction Acts; it only gave him the lesser protection of the Act of 1946. It seems to me plain that that was the sub-tenant's position here during the period of the tenant's tenancy. It would need very plain words in my opinion to lead to the conclusion that the sub-tenant's position was improved because the tenant, from whom he derived his interest, had given up his own interest altogether. That would seem to me an illogical result.

Section 8 of the Act of 1949 is not here relevant: it covers the position where tenants share but the landlord is not one of the sharers. It is on s. 9 that the sub-tenant relies.

[His Lordship read it.] That section, in my view, relates to the position as between a landlord and a tenant who has himself made a sharing sub-tenancy or has sub-let part of the premises furnished. It is saying that as between the head landlord and himself no part of the premises is to be treated as not being a dwelling-house to which the Acts apply. All that we are really concerned with in my opinion is to consider whether s. 9 contains any such express words as would produce the result of which it is necessary for Mr. Bristow to satisfy us, namely, that the sub-tenant here who would not have had the protection of the Rent Restriction Acts if the tenant had remained, now has it. I can find no such express words in this section. In fact, the words in brackets beginning "without prejudice" seem to me expressly to point in a contrary direction. As questions may arise under this section, I do not propose to set out exactly what seem to me to be its precise limits, but it is clear at any rate that it is primarily directed to the problem of a tenant who has created a sharing or furnished sub-tenancy. It seems to me reasonably plain that it would have prevented the landlord, while the tenant was in occupation, from obtaining an order for possession against her because she had effected a sharing sub-tenancy.

I have therefore come to a conclusion different from that of the county court judge, and I think that this appeal must be allowed.

JENKINS, L.J. I agree. The relevant sections of the Act of 1949 are not entirely easy to follow, but in my judgment on the facts of this case it is reasonably plain that the appeal should succeed. Section 7 meets the position considered in *Neale* v. *Del Soto* (14), where part of a dwelling-house is let, the tenant sharing other essential parts of it with the landlord. Section 7 does not say that in such a case the principal Acts shall apply notwithstanding the sharing arrangement, but it recognizes that owing to the sharing arrangement as between landlord and tenant, the latter's accommodation is not a dwelling-house to which the principal Acts apply. That being placed on record, the section provides that the Furnished Houses (Rent Control) Act, 1946, shall apply to the contract.

---

(14) [1945] K. B. 144.

If the sub-tenant's submission here were accepted the curious result would be that, after s. 7 had apparently recognized this particular kind of sharing, that is to say, sharing by the tenant with the landlord, as preventing the premises from being a dwelling-house to which the principal Acts apply, nevertheless, s. 9 would be saying that in this same type of case the principal Acts are to apply. That would be a result so surprising that I would for my part require clear words to produce it.

So far as s. 9 is concerned I agree with my Lord that it is primarily intended to protect the tenant and his sub-tenant as against the tenant's landlord where there have been sublettings, which, considered by themselves, would not have been protected. That is to say, the tenant is given a reasonably free hand to deal with the premises as he thinks fit and he does not jeopardize his whole position or forfeit his rights under the principal Acts merely because he lets some part of the premises furnished or lets some part of them under a sharing agreement. In my judgment, it by no means follows that, where the tenant quits, leaving a sub-tenant in possession of part of the premises with a right to share some other part, that that sub-tenant is still protected as against the former tenant's landlord. I agree with my Lord that there is nothing in the section which constrains the court to place that meaning upon it, and I agree that it cannot be intended in a case like the present to put the sub-tenant in a better position as against the head landlord than that in which he was under his contract with the tenant, his own immediate landlord, after the tenant has vacated the premises and given up the tenancy, and the tenant's landlord has stepped into the tenant's shoes as the immediate landlord of the sub-tenant who had the accommodation with the sharing arrangement.

The county court judge said "in my view, if the whole "purpose of the Landlord and Tenant (Rent Control) Act, 1949, "was to protect the head tenant and not to protect the sub-"tenant as against the landlord, then the distinctions between "s. 7 and s. 8" (I think he must have meant s. 9) "of that "Act become entirely ridiculous". With respect to the judge I do not agree. An obvious distinction is drawn in s. 9 between the position as between the tenant and the head landlord and the position as between the tenant and his sub-tenant. The protection is in the former relationship and not in the latter. By the words in brackets in s. 9: "but without prejudice to "the rights against and liabilities to each other of the tenant

C. A.
1950

SHACKLETON
v.
GREENHALGH.

Jenkins, L.J.

"and any person claiming under him, or of any two such "persons", those rights are expressly saved. For the reasons given by my Lord and such additional reasons as I have given, I agree that the appeal should be allowed.

BIRKETT, L.J. I agree.

Appeal allowed.

Solicitors: *Peacock & Goddard for Mawdsley & Hadfield, Southport; Pritchard, Englefield & Co., for W. & R. Hodge & Halsall, Southport.*

J. A. G.

GOULD *v.* MINISTER OF NATIONAL INSURANCE.

1950
Dec. 11, 12.
1951
Jan. 11.

Ormerod, J.

National insurance—"Employed person"—"Self-employed person"—Music-hall artiste—Employment under standard form of contract—National Insurance Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 (*a*) (*b*).

Whether a person is "an employed person" or "a self-employed person" for the purposes of s. 1, sub-s. 2 (*a*) and (*b*), of the National Insurance Act, 1946, is dependent on the degree of control exercised by the employer over the individual concerned, including both the nature and the amount of that control and the direction in which it is exercised.

On the true construction of the terms of the standard form of contract in general use in the case of music-hall artistes and known as "the Arbitrator's Award 1919 Contract" an artiste employed under it is a "self-employed" and not an "employed" person within the meaning of s. 1, sub-s. 2, of the Act.

CASE STATED by the Minister of National Insurance in accordance with regulations made under s. 43 of the National Insurance Act, 1946.

The following statement of facts is taken substantially from the judgment of Ormerod, J.:—The appellant, F. A. Gould, a music-hall artiste, entered into a contract in writing dated August 31, 1948, with one Prince Littler, acting on behalf of a number of companies set out in a schedule to the contract, to appear with a female partner in a variety act described as a comedy duo at a certain specified theatre for one week from September 6, 1948.

The contract was in the standard form in general use by music-hall artistes, and known as the "Arbitrator's Award 1919 "Contract". The appellant and his partner, in pursuance of the contract, duly performed the variety act at the Grand Theatre, Derby, for a week from September 6, 1948.

By s. 1, sub-s. 2 (*a*), of the National Insurance Act, 1946, an employed person is defined as a person gainfully occupied in employment in Great Britain, being employment under a contract of service. The question for decision in the appeal was whether the contract in the present case should be regarded as a contract of service or whether it was nothing more than a contract for services.

Clause 4 of the contract provided that with the consent of the artiste, not to be unreasonably withheld, he might be transferred during the whole or any part of the agreement to any other theatre owned or controlled by the management. Clause 5 prohibited him from appearing at other theatres within certain prescribed distances and times. Clause 7 provided for penalties to be paid by the artiste if he failed to appear at any performance except through illness or accident. Clause 8 provided for his acting as deputy in an emergency at other theatres owned or controlled by the management in the same town. Clause 9 contained an undertaking by the artiste that his performance would not be dangerous to the audience, other artistes, or the theatre employees. By cl. 15 the artiste might be obliged to perform at the theatre in certain circumstances if there had been a change of management. By cl. 19 he agreed to abide by all reasonable rules which might from time to time be made by the management for the good and orderly conduct or special requirements of their theatres.

The emphasis in the argument was laid more particularly on the rules and regulations attached to the contract by virtue of cl. 19. Rule 1 stipulated that the artiste should attend rehearsals with band parts as stipulated by the management. Rule 2 specified the times at which the artiste should be at the theatre ready to perform. Rule 3 set out the procedure to be adopted in case of illness, and provided that the artiste should, if required, submit to medical examination. Rule 4 concerned the use of improper words or gestures. Rule 5 provided that the artiste might be fined one week's salary, or that his engagement might be cancelled if he were in the theatre in a state of intoxication. Rule 7 gave the management power to prohibit the whole or any part of the performance which they might reasonably consider unsuitable or unpleasing to the audience, and prohibited any variation from the words of songs or dialogue previously approved. By r. 8 the artiste agreed to produce a new, or revert to any old, song, sketch, or act at the reasonable request of the management. Rule 9 provided that the artiste should respond to encores as the management should reasonably direct. Rule 11 prohibited smoking in the dressing-rooms or in close proximity to the stage.

On the above facts the Minister decided: (1.) that the appellant during the period in question was a person gainfully employed in Great Britain; (2.) that the contract was not a contract of service; and (3.) that the appellant was, during the period in question, included in the class of self-employed persons for the purposes of the National Insurance Act, 1946. He gave notice in writing of that decision to the parties concerned on January 10, 1950. No question was raised regarding the first of the three findings, and, in effect, the appeal was against findings Nos. 2 and 3.

Sir Charles Doughty, K.C., and *C. J. A. Doughty* for the appellant.

Beney, K.C., and *E. V. Falk* for the respondent Littler.

J. P. Ashworth for the Minister of National Insurance.

Cur. adv. vult.

Jan. 11. ORMEROD, J., read a judgment in which, after stating the facts as set out above, he continued:—It was contended on behalf of the appellant that the terms of the contract, when read with the rules and regulations, are such as to establish such a degree of control over the appellant that he must be regarded as a servant. The requirement to attend for rehearsal and to submit himself for medical examination if necessary, and the provisions with regard to appearing at other theatres owned by the management, and being barred from appearing at theatres not owned by them, were all urged as instances of control going beyond that which would constitute the contract one for services only, and particular emphasis was laid on rr. 7 and 8, which deal respectively with the right of the management to prohibit the whole or any part of a performance, and to require the appellant to produce a new, or revert to any old song, sketch, or act.

For the respondents it was contended that the degree of control which is imposed by the contract is only such as is necessary for the proper running of the theatre and for compliance with the licensing regulations, and in no way gives the management the right to direct the manner in which the performance should be given.

Numerous cases were referred to in the course of the argument in which a similar question had arisen in the administration of other statutes, and particularly the Workmen's Compensation Acts; but, as Warrington, J., said in *In re The Winter German Opera Ld.* (1): "The question in this and similar cases must "turn upon the particular facts of each particular case, and the

---

(1) (1907) 23 T. L. R. 662.

C. A.

1950
Dec. 13,
14, 15.
1951
Feb. 7.

Evershed, M.R., Singleton and Birkett, L.JJ.

SELLERS v. LONDON COUNTIES NEWSPAPERS.

[Plaint No. F.1176.]

Contract — Master and servant — Wrongful dismissal — Measure of damages — Commercial Traveller — Remuneration by salary and commission—Whether entitled to commission on orders executed after termination of employment.

By an oral agreement of 1947 the defendants agreed to employ the plaintiff as a commercial traveller or advertising representative at a salary of 3*l*. a week and on the terms that on all advertisements which he obtained for the defendants, and which they accepted, he was to be paid a commission when the advertisements appeared in one of their newspapers. The advertisements on which commission was payable were either advertisements which the plaintiff had obtained or advertisements received from his customers which he had been instrumental in obtaining. Orders for advertising space were divisible into three groups: orders for a single advertisement; orders for a series of advertisements continuing for a definite period or until cancelled; and repeat orders, being further orders placed without any further solicitation on his part by customers originally introduced by the plaintiff. The defendants on April 28, 1950, gave to the plaintiff one week's notice terminating his employment on May 4. He brought an action for damages for wrongful dismissal, alleging that he was entitled to three months' notice. The county court judge held that he was entitled to one month's notice expiring on May 28, and awarded him damages estimated on the basis that he was entitled, in addition to his salary, (a) to commission in respect of advertisements attributable to his canvassing and inserted in any of the defendants' newspapers between May 4 and May 28, and (b) to damages for having been deprived of the opportunity of earning further commission between May 4 and May 28. The plaintiff appealed, contending that he was entitled to an account in respect of advertisements obtained by him or through his introduction during his employment and published by the defendants after its termination. He made no claim in respect of repeat orders.

Held, by Singleton and Birkett, L.JJ.; Evershed, M.R., dissenting, that, when the plaintiff had obtained an order for an advertisement, he had done all that was required of him to earn his commission, that, if the defendants accepted and published the advertisement, the plaintiff was entitled to commission, and the defendants could not, by terminating his employment, deprive him of the commission he had thus earned; and that he was entitled to commission on the same principle in respect of an order for an advertisement to continue until cancelled, in which case the plaintiff was entitled to his commission whenever the advertisement was published.

Bilbee v. *Hasse & Co.* (1889) 5 T. L. R. 677, and *Levy* v. *Goldhill* [1917] 2 Ch. 297 considered.

Marshall v. *Glanvill* [1917] 2 K. B. 87, and *Crocker Horlock, Ld.* v. *B. Lang & Co., Ld.* [1949] 1 All E. R. 526 distinguished.

C. A.
1951

SELLERS
v.
LONDON
COUNTIES
NEWSPAPERS.

APPEAL from Judge Leon sitting at Clerkenwell county court.

By an oral agreement of October, 1947, the defendants, London Counties Newspapers, a firm, agreed to employ the plaintiff, as they alleged, as an advertising representative, or, as he alleged, as a commercial traveller. The county court judge made no finding on the terms of the employment. It appeared from the particulars of claim and the defence that the plaintiff was employed to sell advertising space in the defendants' newspapers on the terms that he should be paid a salary of 3*l*. a week and a commission of 7½ per cent. on all sales of such space effected by him. The parties agreed that the commission was only payable if and when the relevant advertisements had actually appeared in one of the defendants' newspapers. The orders which the plaintiff obtained might be for a single advertisement, or for a series of advertisements appearing either for a definite period or until publication was stopped, referred to as "running contracts". There might also be repeat orders, that is, orders sent in by one of his customers without further solicitation by him. The plaintiff was entitled to commission on advertisements obtained by him and on advertisements obtained from his customers. The terms of the agreement are considered in detail in the judgment of Evershed, M.R.

On April 28, 1950, the defendants gave the plaintiff one week's notice terminating his employment on May 4. In this action he claimed damages for wrongful dismissal, alleging that he was entitled to three calendar months' notice to terminate his engagement. The county court judge held that the plaintiff was entitled to one calendar month's notice expiring on May 28, and accordingly that he had been wrongfully dismissed. He awarded him 10*l*. 10*s*. 0*d*. damages. This figure was made up (after allowing for payments made to the plaintiff by the defendants) of three elements: (a) loss of salary up to May 28; (b) commission accruing to the plaintiff during May on orders which he had previously obtained and which had been printed; and (c) the commission which he might have earned up to May 28 if he had not been wrongfully dismissed. The plaintiff appealed, claiming that he was also entitled to commission on any orders for advertisements which he had obtained for the defendants while employed by them which were in fact published by them after May 28. He made no claim to commission on repeat orders.

Sir Godfrey Russell Vick, K.C., and *H. H. Harris* for the plaintiff. It is submitted that the county court judge misdirected himself and that the plaintiff is entitled to an account of the

ORMEROD, J. I think the subject-matter of the appeal is of sufficient public interest to make it necessary that it should be fully argued in this court, and that in the circumstances the case is one in which the proper order is that the Minister should pay the costs.

Appeal dismissed.

Solicitors: *Clare and Clare; Hall, Clark & Co.; The Solicitor, Ministry of National Insurance.*

P. B. D.

C. A.

CURTIS *v.* MALONEY.

1950 Oct. 12, 13; 27.

Somervell, Cohen and Denning, L.JJ.

Execution—Sheriff's seizure of plaintiff's vessel in possession of execution debtor—Sale of vessel by sheriff, without claim having been made to it—Title of purchaser—Bankruptcy and Deeds of Arrangement Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 34), *s.* 15.

Section 15 of the Bankruptcy and Deeds of Arrangement Act, 1913, provides that, where any goods in the possession of an execution debtor at the time of seizure by a sheriff, high bailiff or other officer, are sold by such sheriff, high bailiff or other officer, without any claim having been made to them, "the purchaser of the goods "so sold shall acquire a good title to the goods so sold", and there then follows certain protection to the sheriff, high bailiff or other officer. The section continues: "Provided that nothing in this "section contained shall affect the right of any claimant, who may "prove that at the time of sale he had a title to any goods so "seized and sold, to any remedy to which he may be entitled against "any person other than such sheriff, high bailiff or other officer as "aforesaid".

The true construction of that section is that, on the sale of the goods by the sheriff, high bailiff or other officer without any claim having been made to them, the purchaser of the goods acquires a good title to them as against all the world, notwithstanding the words of the proviso. The proviso cannot be read so as to contradict the words, "the purchaser of the goods so sold shall acquire a good "title to the goods so sold", and make them meaningless by excluding from them the person who was the owner of the goods before the sale. The proviso may be explained by the anxiety of the draftsman not to deprive the owner of the goods of his remedy against the execution creditor for the proceeds of the sale, as money had and received, or (*per* Denning, L.J.) of his remedy against any wrongdoer, other than the sheriff, high bailiff or other officer, who has converted the goods before the sale. But for the proviso, an execution creditor might have argued that the original owner's claim for money had and received was not preserved. Any such argument, good or bad, is defeated in advance by the proviso.

Per Somervell, L.J. Had it been necessary, he would have held that the word "purchaser" had been omitted by inadvertence in the last line of the proviso between the word "such" and the word "sheriff".

Decision of Finnemore, J., affirmed.

APPEAL from Finnemore, J.

The motor cruiser *Seahawk*, the property of the plaintiff, when in the possession of an execution debtor, was seized by the sheriff under a writ of fi. fa. The sheriff sold the ship to the defendant without any claim having been made to it. The plaintiff demanded the vessel from the defendant, and, on his failure to deliver it to him, sued him in detinue for the vessel or its value—450*l*. In the action the defendant claimed that he had acquired a good title to it by virtue of s. 15 of the Bankruptcy and Deeds of Arrangement Act, 1913 (1). Finnemore, J., upheld that contention, and the plaintiff appealed.

Glyn-Jones, K.C., and *Chedlow* for the plaintiff. The contention of the plaintiff is that s. 15: (a) protects the sheriff, high bailiff or other officer who has acted in good faith; (b) then, subject to that protection, protects all the rights of any person who may prove that, at the time of the sale, he had a title to the goods; and then (c), subject to the protection given by (a) and (b), protects the purchaser of the goods, i.e., protects the purchaser against any attack upon his title by anyone other than the person who had the title at the time of the sale. Finnemore, J., in his judgment divided the section into two parts: the enactment and the proviso. He held that by the first part—the enactment—the purchaser was given a good title to the goods whilst the sheriff, high bailiff or other officer who acted in good faith was protected. Then he construed the proviso as preserving to the person who was owner at the time of the sale all rights which he might have against others than the purchaser or the sheriff, high bailiff or other officer, though he stated that probably he did not need any such preservation of his right against the execution creditor for money had and received, i.e., the proceeds of the sale.

---

(1) The Bankruptcy and Deeds of Arrangement Act, 1913, s. 15: (Sidenote) "Protection of sheriff, etc., "selling goods under execution without notice of claim by third party". "Where any goods in the possession of an execution debtor at "the time of seizure by a sheriff, "high bailiff or other officer charged "with the enforcement of a writ, "warrant or other process of execution are sold by such sheriff, "high bailiff or other officer without any claim having been made "to the same, the purchaser of the "goods so sold shall acquire a good "title to the goods so sold and no "person shall be entitled to recover "against the sheriff, high bailiff or "other officer, or anyone lawfully "acting under the authority of either "of them except as provided by the "Bankruptcy Acts, 1883 and 1890, "for any sale of such goods or for "paying over the proceeds thereof, "prior to the receipt of a claim to "the said goods unless it is proved "that the person from whom recovery "is sought had notice; or might by "making reasonable inquiry have "ascertained that the goods were not "the property of the execution debtor: "Provided that nothing in this section contained shall affect the right "of any claimant, who may prove "that at the time of sale he had a "title to any goods so seized and "sold, to any remedy to which he "may be entitled against any person "other than such sheriff, high "bailiff or other officer as aforesaid".

But there is no rule that the first part of the section, which may be construed as the enacting part, is first to be construed without reference to the subsequent proviso. The proviso controls or alters the operative effect of the words preceding it: *Jennings* v. *Kelly* (2), and the judgment of Lord Russell of Killowen (3). The proviso is intended to exclude from the operation of the preceding words something which, but for the proviso, would be affected thereby, that is, the right of the owner who may prove that at the time of the sale he had a title to goods so seized to sue in detinue the purchaser, i.e., anyone but the sheriff, high bailiff or other officer, and so the purchaser. The sole question at issue here is: what protection does s. 15 give to the purchaser of the vessel? To ascertain this, all parts of the section must be considered. Apart from the section, at common law, the plaintiff as the owner of the vessel at the time of the sale is entitled to it. Does s. 15 affect his position?

It is plain that, at first, the section appears to give to the purchaser a good title to the vessel. The purchaser receives X. Then from what has been given something is taken away by the proviso, and if that something is called Y, the purchaser receives X–Y. Nothing in the section is to affect the right of any claimant who may prove that at the time of the sale he had a title to any goods so seized and sold except as against the sheriff, high bailiff or other officer. What then remains of the preceding words: "the purchaser of the goods so sold shall acquire a good "title to the goods so sold"? Suppose that, at this sale by the sheriff, an inflated price were received. The owner at the time of the sale might prefer to affirm the sale and then sue the execution creditor for money had and received to his use—the large price paid for the goods. In that case the purchaser would obtain his title to the vessel by virtue of the section. And this must be the meaning of the section: where the owner of the goods before the sale, who has been deprived of the possession of the goods, prefers to pursue his remedy against the execution creditor rather than against the goods, then the purchaser obtains a title to the goods. It is plain that the object of the section, as appears from the side-note, was to give protection to the sheriff, high bailiff or other officer who, acting in good faith, has sold the goods. It is submitted that, unless the proviso has this meaning, it can have no meaning at all, which is absurd. If, owing to the chance that the original owner's goods were in the possession of an execution debtor, that owner were deprived of his title to the goods when they were sold by the sheriff, high bailiff or other officer, that would be an astonishing and revolutionary invasion of the rights of the subject at common law. The sheriff does not warrant the title of the goods which he sells: *Chapman* v. *Speller* (4).

---

(2) [1940] A. C. 206.

(3) Ibid. 220.

The words of the proviso are: "Provided that nothing in this "section contained shall affect the right of any claimant, who "may prove that at the time of sale he had a title to any goods "so seized and sold, to any remedy to which he may be entitled "against any person other than"—not "such purchaser", but —"such sheriff, high bailiff or other officer, as aforesaid". These words establish the plaintiff's right to the ownership and possession of the vessel in this case. It is plain that the omission of the word "purchaser" after the word "such" and before the word "sheriff" was intentional and deliberate. If the purchaser is to be granted a good and complete title, that word in that place in the proviso is necessarily required, and it is not there.

On the construction of the section advanced for the plaintiff there is no contradiction in the section: its parts are harmonious and show that the object of it is the protection of the sheriff, high bailiff and other officer. The purchaser does obtain a slight benefit by the section in the case where the owner at the time of the sale affirms the sale with a view to pursuing his remedy against the execution creditor for money had and received. It would also assist a purchaser against a sub-purchaser alleging breach of warranty of title. The execution creditor is liable to repay the moneys which he has received: *Jones Brothers (Holloway) Ld.* v. *Woodhouse* (5); Halsbury's Laws of England (2nd ed.), Vol. 14, tit. Execution, at pp. 23–4, para. 45, and the cases there cited in note *(f)*: *Rush* v. *Baker* (6); and *Whitmore* v. *Greene* (7). It may be that one object of the section is to show that the execution creditor remains unprotected.

The words used in the earlier part of the section: "the "purchaser of the goods so sold shall acquire a good title to the

---

(4) (1850) 14 Q. B. 621.
(5) [1923] 2 K. B. 117.
(6) (1734) Buller N. P. 41.
(7) (1844) 13 M. & W. 104, *per* Pollock C.B. at p. 111.

"goods so sold", as the following words show, are for the protection of the sheriff, high bailiff or other officer. The proviso is afterwards inserted to make clear that this is so, and that the rights and remedies of the owner at the time of the sale are preserved.

Peter Bristow for the defendant. At common law, apart from s. 15, the person who was the owner before the sale after the sale (1.) could sue the purchaser in detinue or conversion; (2.) could sue the sheriff in detinue or conversion; and (3.) could sue the execution creditor, after he had received the proceeds of sale, for money had and received. It is evident that s. 15 of the Bankruptcy and Deeds of Arrangement Act, 1913, was passed to disturb that status quo. The first and primary object was to give the purchaser a good title to the goods sold, since that is the first statement of law predicated by the section. It was the purchaser of the goods who before 1913 stood to lose. He had no remedy against the sheriff, since the sheriff did not warrant the title of the goods sold. The purchaser was without remedy. The sheriff, if sued, had his remedy against the execution creditor, who held the proceeds of what had been wrongfully sold. No doubt it is difficult to reconcile the words of the proviso with the original definite provision in the enacting part of the section that the purchaser is to obtain a good title to the goods sold. A good title can only mean a title good as against all the world, and the only person against whom he needs a title is the owner at the time of the sale. The purchaser is not directly alluded to in the proviso: there is no necessity for that. The proviso is concerned with protecting the sheriff, high bailiff or other officer, and with preserving the rights of the owner at the time of the sale as against the execution creditor who is in possession of the proceeds of the sale.

If there had been no proviso, if the owner of the goods before the sale had sued the execution creditor, the defence might have been this: s. 15 has divested you of your title to the goods sold, how can you maintain that the proceeds of the sale are yours? The proviso, covering the position of the owner of the goods before the sale, was required to remove any doubt on this issue. It may be that the proviso is concerned with remedies which the owner at the time of the sale had against those other than the sheriff, high bailiff or other officer in respect of acts done before the sale. If that is not the meaning of the proviso, the section is contradictory and appears to be nonsense; in the first part it gives the title to the goods sold to the purchaser and then by the proviso takes away that title: see the observations of Lord Wright in *Jennings* v. *Kelly* (8).

---

(8) [1940] A. C. 206, 229.

The proviso is not an exception to what is clearly defined in the operative part of the section, but merely a qualification, not inconsistent with the earlier words.

[Maxwell on Interpretation of Statutes (9th ed.), Chap. 9, at pp. 236–9, referred to.]

Glyn-Jones, *K.C.*, replied.

Cur. adv. vult.

Oct. 27. SOMERVELL, L.J. Section 15 of the Bankruptcy and Deeds of Arrangement Act, 1913, on which the defendant relies, must be construed as a whole. Words in a proviso may affect not only the range—they almost always do that—but also the meaning of words which precede the proviso: see *Jennings* v. *Kelly* (9). It is submitted by Mr. Glyn-Jones for the plaintiff that since he had a title to the goods at the time of the sale and since, apart from s. 15, he would have had a remedy against the defendant, and since the defendant is a "person other than such sheriff, "high bailiff or other officer" as aforesaid within the meaning of the last words of the proviso, the right of the plaintiff against the defendant is preserved by the proviso. He submitted that if it had been intended to take away the plaintiff's right against the purchaser of the goods, the word "purchaser" also would have appeared in the last line of the proviso after the word "such". There is clearly force in this argument. It leads to the question whether any meaning can be given to the words preceding the proviso conferring a good title on the purchaser, if he is liable to surrender the goods or their value to the person who is the owner at the time of the sale. Mr. Glyn-Jones suggested a case in which the person who was owner before the sale affirmed the sale by suing the judgment creditor for money had and received. In those circumstances, it seems to me, neither the purchaser, nor a sub-purchaser from him, would need the protection of the words in question. I do not think that any case was suggested which would leave the words with any content. Even however if such a case could be imagined the effect of the section contended for, so far as a purchaser is concerned, is as follows: "the purchaser "of the goods shall acquire a good title to the goods so sold, "except as against the owner at the time of the sale". This seems to me not to cut down, or give a restricted but possible meaning to the words "shall acquire a good title", but to contradict them. Although I am not sure that it affects the construction, the addition of the epithet "good", emphasizes the impossibility to my mind of reconciling the construction put upon the proviso with the words used earlier.

---

(9) [1940] A. C. 206.

It was suggested at one time that the proviso might be construed as limited to remedies which the owner at the time of the sale might have (other than against the sheriff) in respect of acts done before the sale. It was however pointed out that such remedies are plainly not affected by the words preceding the proviso. It was also suggested, and there is I think some force in this, that the proviso might have been inserted to remove the possibility of argument that the right of the owner at the time of the sale to proceed against the execution creditor for money had and received had been affected by the provisions validating the sale. I do not think that this suggestion overcomes the difficulty caused by the absence of the word "purchaser" after the word "such" in the last line of the proviso. The only possible explanation of this that has occurred to me (and I doubt whether it helps) is based on the view that the words preceding the proviso "destroy" the right of the plaintiff as against the purchaser but only "affect" the right as against the sheriff, in that in certain circumstances that right will be effective, e.g., if reasonable inquiry might have disclosed that the goods were not the debtor's. On this basis the word "affect" is inapt to cover the purchaser who has been fully protected by being given a good title.

I do not think that one obtains assistance from any known presumption of what Parliament may or may not have intended. Protection of purchasers for value without notice as against the legal owner is a principle well known in both law and equity. There is, I think, no presumption either for or against its extension.

I have come to the conclusion that the judge at the trial was right, for the reasons which he gives. I agree with him that a good title can only mean a good title against everyone. I agree with him that the proviso cannot be read so as to contradict and make these express words meaningless by excluding from them the true owner at the time of the sale. It may be, as he held, that it is not necessary so to read it. If it is necessary, I would hold that the word "purchaser" must have been omitted by inadvertence after "such".

For these reasons I think the appeal should be dismissed.

COHEN, L.J. This case has been very well argued, and I have felt considerable doubt as to the proper construction of the section. Mr. Bristow contended that no effect would be given to the provision in the operative part of the section, that the purchaser of the goods sold should have a good title thereto, if we were to accept the argument for the appellant and hold that under the proviso the true owner could sue the purchaser in detinue.

Mr. Glyn-Jones contended that the proviso would be meaningless, unless we were to accept his argument, since on Mr. Bristow's construction, the only right that it was suggested that the proviso would cover would be a right of action for money had and received against the execution creditor, a right which, said Mr. Glyn-Jones, would have subsisted equally well if the proviso had been omitted. Each counsel sought to cast doubt on the other's argument. Mr. Glyn-Jones suggested that the words in the operative part of the section might assist the purchaser against a sub-purchaser alleging breach of warranty of title, if the true owner had elected to affirm the sale and had sued the execution creditor for the proceeds of sale as money had and received. Mr. Bristow suggested that doubt might have arisen from the words in the operative part of the section as to the right of the owner before the sale to sue the execution creditor and that the proviso was inserted for removal of doubts.

I cannot think that the draftsman was contemplating the event postulated by Mr. Glyn-Jones. Mr. Bristow's suggestion is more probable; but, ultimately, we must abandon guesswork and return to the language of the statute and apply thereto the accepted rules of construction. Mr. Glyn-Jones called our attention to *Jennings* v. *Kelly* (10), where the House of Lords considered the principles applicable to the construction of a section which contained a proviso.

Mr. Glyn-Jones relied in particular on a passage from the speech of Lord Russell of Killowen where he said (11): "I do "not agree with the contention of the appellants, which appears "in the second reason in their case, namely, that 'it is not a "'right method of construction to use a proviso to control or "'alter the operative effect of the words preceding it'. That "is frequently the very function of a proviso, namely, to include "within the scope of the preceding words something which prima "facie would not fall within it, or to exclude something which "prima facie would so fall. Although a proviso may well be "incapable of putting upon preceding words a construction which "they cannot possibly bear, it may without doubt operate to "explain which of two or more possible meanings is the right "one to attribute to them".

Applying those observations to the present case, Mr. Glyn-Jones said that the proviso was plainly intended to exclude from the operation of the preceding words something which would otherwise be affected thereby. That thing was the right of the owner to sue in detinue anyone but the sheriff, high bailiff or other officer. If it had been the intention of the draftsman to extend the protection given to the owner before the sale to the purchaser, it would have been easy to say so, so easy indeed that the omission must be taken to be intentional.

---

(10) [1940] A. C. 206.

(11) Ibid. 220.

Mr. Bristow, on the other hand, relied on what was said by Lord Wright (12): "It is said that where there is a proviso, "the former part, which is described as the enacting part, must "be construed without reference to the proviso. No doubt there "may be cases in which the first part is so clear and "unambiguous as not to admit in regard to the matters which "are there clear any reference to any other part of the section; "the proviso may simply be an exception out of what is clearly "defined in the first part, or it may be some qualification not "inconsistent with what is expressed in the first part. But in "the present case, not only is the first part of the section "deficient in express definition, but the second part is comple"mentary and necessary in order to ascertain the full intention "of the legislature. The proper course is to apply the broad "general rule of construction, which is that a section or enact"ment must be construed as a whole, each portion throwing "light, if need be, on the rest. I do not think that there is any "other rule even in the case of a proviso in the strictest or "narrowest sense. Still less, where, as here, the introduction of "the second part by the word 'provided' is in a strict sense "inapt". Here, says Mr. Bristow, the proviso is not an exception to what is clearly defined in the operative part, but merely a qualification, not inconsistent with the first part. The first part gives the purchaser a good title and the qualification removes any doubt as to the preservation of the right of the owner before the sale against the execution creditor, a qualification not inconsistent with the good title remaining in the purchaser.

On the whole, though not without doubt, I think that Mr. Bristow's argument should prevail. It seems to me impossible on Mr. Glyn-Jones' construction to give any real meaning to the provision that the purchaser shall acquire a good title. On the other hand, it might have been arguable, but for the proviso, that as the purchaser had acquired a good title, an action by someone else as true owner, being a person from or through whom the purchaser did not derive title, must fail. I do not think that that argument would have succeeded, but it seems to me more likely that the proviso was inserted to remove any doubt as to the right of the owner of the goods before the sale to sue the execution creditor for money which he had received, than that it was intended, not merely to cut down the protection given to the purchaser, but to render it illusory.

(12) [1940] A. C. 206, 229.

In the result I think that the conclusions of the judge were right, and the appeal should be dismissed.

DENNING, L.J. This is yet another instance of a contest between the common-law rule, that no man can give a better title than he has got and the statutory exceptions in favour of innocent purchasers. I do not think that we ought to whittle down the protection which Parliament has given to innocent purchasers. In a commercial community it is very important that their title should be protected.

The words of this section are clear beyond peradventure "The purchaser of the goods so sold shall acquire a good title" to them and I think that the words should be given their full effect. The proviso is to be explained by the anxiety of the draftsman not to deprive the original owner of his remedy against the execution creditor or against any wrongdoer who had converted the goods before the sale. If it were not for the proviso, the execution creditor might have argued that the original owner's claim for money had and received was not preserved, for the action for money had and received is only sustainable by a true owner who is claiming the proceeds in lieu of the goods themselves: and that it failed when he ceased to be the true owner. Any such argument, good or bad, is defeated in advance by the proviso.

In case it should be thought that our decision will work hardship to true owners, I would say that the sheriff can be trusted not to sell the goods where there is any ground for thinking that they do not belong to the debtor, as for instance, when the debtor's business consists in repairing goods for others: because the sheriff is himself liable if he had notice, or might, by making reasonable inquiry, have ascertained that the goods were not the property of the debtor.

In my opinion the section gives a good title to the innocent purchaser, and this appeal should fail.

Appeal dismissed.

Solicitors: *R. I. Lewis & Co.; White and Leonard for H. M. Pinney, Hornchurch.*

C. G. M.

C. A.

1950
Oct. 16.

Somervell and
Denning, L.JJ.

CLAYSON v. ROLLS ROYCE LD. AND EVANS LIFTS LD.

Procedure—Discovery—Interrogatories—Two defendants—Contribution or indemnity—No third-party procedure—Application by one defendant to interrogate the other—" Opposite party "—Notice under R. S. C. Ord. 16A, *r.* 12, *to be issued and served before application to interrogate.*

Where one defendant, who wishes to claim contribution or an indemnity against another defendant under s. 6, sub-s. 2, of the Law Reform (Married Women and Tortfeasors) Act, 1935, seeks discovery (such as delivering interrogatories) against that other defendant, he must first, before seeking that discovery, serve a notice under R. S. C. Ord. 16A, r. 12, on that defendant, which he can do without leave, claiming the contribution or indemnity—a notice which necessitates an order for directions. The master, then, before whom the application for discovery is made, will have before him a record of what issues the applicant seeks to raise, and in what way he seeks contribution or an indemnity. In such a case the practice sanctioned in *Croston* v. *Vaughan* [1938] 1 K. B. 540 (whereby the notice can usually be omitted) does not apply.

Per Denning, L.J. On the application for an order for directions, after such a notice under R. S. C. Ord. 16A, r. 12, the master, to save expense, should refuse to direct pleadings as between the two defendants, except when he is satisfied that they are necessary.

Appeal from Parker, J., in chambers.

The plaintiff was an infant, employed by the first defendants. By her next friend, in her statement of claim, she claimed damages for personal injuries caused by a defective lift at the premises of the first defendants owing to breach of statutory duty and negligence on the part of those defendants. They, by their defence, alleged, inter alia, that the plaintiff's injury was caused by Evans Lifts Ld., stating that there was a contract between themselves and that company that the lift in question should from time to time be examined by a competent mechanic employed by the company, who were to report to the first defendants anything which could by an external examination be determined as being in need of attention.

The first defendants said that they would refer to this contract at the trial, and alleged that Evans Lifts Ld. knowing of defects in their lift, failed to bring them to the notice of the first defendants. They relied on that fact in answer to the plaintiff's claim.

Thereupon, the plaintiff added Evans Lifts Ld. as second defendants to the claim. The second defendants admitted the existence of the contract between themselves and the first defendants, but denied all negligence. Neither of the defendants had issued a third-party notice against the other under R. S. C.

Ord. 16A, r. 1, or issued or served, as they could do, without leave, any notice under r. 12 of Ord. 16A, claiming contribution or indemnity.

The second defendants applied for leave to deliver to the first defendants twenty-three interrogatories. Master Baker refused the second defendants leave to deliver the interrogatories on the ground that the first defendants were not their " opposite parties " within the meaning of R. S. C. Ord. 31, r. 1 (1).

Parker, J., upheld that decision, and the second defendants now appealed.

H. I. Nelson, K.C., and *R. H. Forrest* for the second defendants. Parker, J., refused leave to our clients to deliver these interrogatories to the first defendants on the ground that they were not " opposite parties " within the meaning of R. S. C. Ord. 31, r. 1 (1). The note in the Annual Practice, 1949, under the words " Opposite Parties " is in these terms: " A party not " on the other side of the record is an opposite party, within " the meaning of these rules, if between him and the applicant " there is some right to be adjusted in the action, which in " Chancery actions might often be the case between two plaintiffs " or two defendants ". *Shaw* v. *Smith* (2) is there cited, where it was held that under the then R. S. C. Ord. 30, r. 3, inspection could not be granted to one defendant of property belonging to another defendant, when there was no right in question as between them in the action. The parties here are on the same side of the record, but it is plain from the pleadings that there may well be an issue between them—that of contribution: see s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, and, by way of illustration, *Whitby* v. *Burt, Boulton and Hayward Ld.* (3).

Neither of the defendants has issued a third-party notice against the other defendants under R. S. C. Ord. 16A, r. 1, or issued or served, as they could have done without leave, any notice under r. 12 of Ord. 16A, claiming contribution or an indemnity. But that was not necessary if in fact there was the issue of contribution between them.

In *Croston* v. *Vaughan* (4), where the plaintiff was injured in an accident caused by the negligence of the drivers of two vehicles, Porter, J., at the end of the proceedings apportioned the blame between the two defendants for the purpose of fixing the contribution as between the two tortfeasors, holding that it was not necessary that separate formal legal proceedings should be instituted for that purpose by way of third-party notice, or a notice under r. 12 of Ord. 16A. The Court of Appeal upheld that decision, holding that it was within the discretion of the trial judge to take that course.

---

(1) R. S. C. Ord. 31, r. 1: " In " any cause or matter the plaintiff " or defendant by leave of the court " or a judge may deliver interrogatories in writing for the examination of the opposite parties or any " one or more of such parties . . . ".

(2) (1886) 18 Q. B. D. 193.

(3) [1947] K. B. 918.

(4) [1938] 1 K. B. 540.

Humfrey Edmunds for the first defendants. The first defendants were not " opposite parties " within the meaning of R. S. C. Ord. 31, r. 1, since at the time of the application to deliver interrogatories there was no right to be adjudicated upon *in the action* between them. Lopes, L.J., said in *Shaw* v. *Smith* (5): " I think that by ' opposite parties ' the court must have meant " parties between whom some question was in conflict in the " action ". Third-party procedure constitutes a separate lis. Once a party applies to interrogate, the first question which arises for the court is what are the issues arising in the action between that party and the party he seeks to interrogate. Section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, sets up a new cause of action for contribution: it is not a cause of action in tort but one in quasi-contract.

In *Croston* v. *Vaughan* (6) there was a departure from ordinary practice. But it has no bearing on the rule laid down in *Shaw* v. *Smith* (7) that in the case of discovery, including interrogation, there must be a lis in the action between the parties. There was no reason why, as in *Croston* v. *Vaughan* (6), the lis, although not pleaded, should not be considered by leave of the court; but here, quite rightly, no such leave was given, since the lis in such a case as this must be specifically pleaded, and the issues between the defendants well defined before leave could be granted to deliver any interrogatory.

The claim of the first defendants that the second defendants are wholly responsible for the damage to the plaintiff, if they succeed in their claim, appears to be based on the contract made between the first defendants and the second defendants. That fact necessarily involves the proposition that not only must there be a lis between the two defendants but that the issues between them, probably of some complexity, must be defined before any application is made for discovery. [*Tritton* v. *Bankart* (8) referred to.]

C. H. Duveen for the plaintiff.

Nelson, K.C., in reply. The right of contribution here, if any, arises by virtue of statute. Scott, L.J., in *Croston* v. *Vaughan* (6), thought that s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, should be read as giving the

(5) 18 Q. B. D. 193, 200.
(6) [1938] 1 K. B. 540.
(7) 18 Q. B. D. 193.
(8) (1887) 56 L. J. (Ch.) 629.

judge, on the evidence he had heard, complete jurisdiction to assess the blame of each tortfeasor just as if he had held them liable as defendants to the plaintiff for that portion of the blame only. There was, therefore, by statute at the time of the application to deliver interrogatories, an issue between the two defendants. The master therefore had jurisdiction to make an order for the delivery of interrogatories, although no notice had hitherto been given by either defendants under R. S. C. Ord. 16A, r. 12. Should the court hold that such notice was necessary it could have been ordered by the master to be given them forthwith.

SOMERVELL, L.J. This is a claim by an infant. She was employed in the works of the first defendants, Rolls Royce Ld., and she claims damages "for personal injuries and loss and "damage caused by a defective lift at the first defendants' "premises owing to the breach of statutory duty and/or the "negligence of the first defendants or their agents and/or owing "to the negligence of the second defendants". The claim against the first defendants is, of course, in a very familiar form. It relies on breach of statutory duty and also on negligence. The second defendants come on to the scene because of the defence of the first defendants, who pleaded that the injuries were caused by the negligence of the second defendants. They alleged a contract between themselves and the second defendants under which the second defendants agreed to examine the lift by a competent mechanic and to report from time to time upon anything which could by an external examination be determined as being in need of further attention; and they pleaded that they would refer to the contract at the trial. Then they pleaded that the second defendants knew of these defects and failed to give notice of them, and they rely on these facts in answer to the plaintiff's claim. In effect, they contended: "We were not "negligent at all, but others were, and they are responsible to "you". No doubt this contention might raise questions of law, where the plaintiff had pleaded a breach of statutory duty. But neither defendants have, so far, taken the procedure to claim contribution or an indemnity from the other defendants by virtue of the contract between them, in the event of their being held liable to the plaintiff. The second defendants admitted the contract, but they denied the negligence. That, I think, is a sufficient reference to the pleadings for the purpose of this judgment.

Mr. Nelson says that the decision of the judge, refusing leave to the second defendants to deliver interrogatories to the first defendants, was wrong because of s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, sub-s. 1 of which provides: "Where damage is suffered by any person as a result "of a tort . . . (*a*) judgment recovered against any tort-feasor "liable in respect of that damage shall not be a bar to an action "against any other person who would, if sued, have been liable "as a joint tort-feasor in respect of the same damage". Then the section, summarized, provides that, each tortfeasor being liable under the common law for the whole of the damage, a tortfeasor who has been so held may recover contribution from any other tortfeasor, and the amount of that contribution shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage.

Mr. Nelson also referred, and it was a necessary part of his submission, to the procedure which has grown up and which was declared to be valid and proper by this court in *Croston* v. *Vaughan* (9). That was an action of a more usual kind than this in that it was concerned with motor-cars. The plaintiff was claiming that two defendants had been negligent and that the accident was caused either by the negligence of one or the other or both. At the conclusion of the proceedings, immediately after judgment had been delivered, an application was made to the judge to apportion the blame between the two defendants in accordance with the Act of 1935. The judge apportioned the blame as to two-thirds against the one defendant and as to one-third against the other, and it was held that the judge had jurisdiction to make that apportionment; and that it was a matter of discretion for the judge whose decision could not be disturbed by the Court of Appeal. We were told that that practice has been followed and that in that class of case it is unusual to operate the procedure of a notice under the rules, to which I shall refer. Sometimes a letter is written and sometimes no communication is given beforehand, it being recognized, perhaps, that in that class of case an application on those lines will be made if both are held to blame.

I will confine my decision to the facts of this case, that is to say, the case in which one defendant is seeking to administer interrogatories to another defendant. I wish to say nothing which can throw doubt or might impede the practice referred to in *Croston's* case (9), where there is no question of interrogatories or discovery. The interrogatories have not been read here, nor were they below. There are some twenty-three of them. There is also an application for discovery and possession of a lock which was part of the machinery which contributed to the accident. No one disputed before us that R. S. C. Ord. 16A, r. 12, the rule concerning the position if one defendant seeks

(9) [1938] 1 K. B. 540.

C. A.
1950
CLAYSON v. ROLLS ROYCE LD. AND EVANS LIFTS LD.
Somervell, L.J.

contribution or indemnity from another, would cover the case of such an ordinary claim in a running down action against two defendants such as was dealt with informally (if that is the right expression) or dealt with by an application after judgment, as I have described, in *Croston's* case (10).

The rule provides: "Where a defendant claims against "another defendant (a) that he is entitled to contribution or "indemnity, or (b) that he is entitled to any relief or remedy "relating to or connected with the original subject-matter of "the action and substantially the same as some relief or remedy "claimed by the plaintiff . . . the defendant making the claim "may without any leave issue and serve on such other defendant "a notice making such claim or specifying such question or "issue. (2.) No appearance to such notice shall be necessary "and the same procedure shall be adopted for the determination "of such claim, question or issue between the defendants as "would be appropriate under this order if he were a third party", and that, of course, involves an order for directions.

In my opinion, where one defendant as against another defendant is alleging a right to discovery, as he is in this case, by seeking to deliver interrogatories and a contest arises, then it is right that he should first deliver a notice under R. S. C. Ord. 16A, r. 12, and that the procedure under the rules should be invoked. This case is a very good example of the importance of defining what is the right to be adjusted as between the two defendants. I had to ask Mr. Nelson during the course of the argument how the question of a contribution would arise, and what form it might take. There also is a contract between the first and the second defendants which, on the face of it, might be relevant if a court were asked to decide as to any liability as between one defendant and the other. I think that, where issues as to discovery arise, the procedure which was perfectly satisfactory in *Croston's* case (10) is not satisfactory, and that the party seeking discovery should serve his notice on the other defendant so that the court when it comes to determine his claim can have a record of what issues he seeks or is anxious to raise. In the present case, perhaps, neither side is relying upon the contract between them; but it may be that, if the issue of the liability of the first defendants to the second defendants is raised by a notice, one or other side may rely on that.

For these reasons I think that the appeal must be dismissed.

DENNING, L.J. In ordinary cases where a defendant claims contribution from a co-defendant under s. 6, sub-s. 2, of the Law Reform (Married Women and Tortfeasors) Act, 1935, it is

(10) [1938] 1 K. B. 540.

C. A.
1950

Clayson v. Rolls Royce Ld. and Evans Lifts Ld.

Denning, L.J.

not necessary for the full third-party procedure to be followed, and since *Croston* v. *Vaughan* (11) it never has been. It is, I think, desirable that notice should be given by letter that a claim for contribution will be made under R. S. C. Ord. 16A, r. 12, but even this is not essential in ordinary collision cases, where the issues between two defendants are plain and do not need further definition. Exceptional cases may, however, arise, like the present one, in which one of the defendants desires to obtain particulars, or discovery of documents, or interrogatories from his co-defendant. Then it is essential for him to serve a notice claiming contribution and to apply for an order for directions. But this expense should not be incurred unless it is necessary for fairly disposing of the matter, and the master should, I think, refuse to direct pleadings as between the two defendants or to give other directions except where he is satisfied that they are necessary.

In this case, I think that it was, as a necessary foundation for the application to administer interrogatories, essential that a notice claiming contribution should have been served. As it was not served before the application was heard by the master or the judge, I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Carpenters for Laces & Co., Liverpool; Hewitt, Woollacott & Chown; George A. Herbert for T. Moore, Birkenhead.*

C. G. M.

---

(11) [1938] 1 K. B. 540.

C. A.
1950
Dec. 1.

Somervell, Jenkins and Birkett, L.JJ.

COOK *v.* SHOESMITH.

[Plaint No. F. 1426.]

Landlord and Tenant—Agreement "not to sublet"—Construction—Subletting part of premises—Whether breach.

By a tenancy agreement in writing, a tenant agreed as follows: "I hereby agree to rent" the house in question, at a specified rent "and I further agree not to sublet". The tenant, without the landlord's consent, sublet two of the top rooms of the house, and the landlord sought possession for breach of the undertaking not to sublet.

Held, that, on its true construction, the undertaking in the agreement "not to sublet" was not broken by subletting part of the

[Reported by J. A. Griffiths, Esq., Barrister-at-Law.]

premises, for the verb "to sublet" must have an object and its only possible object was the house which was the subject-matter of the agreement. Consequently the principle that a covenant not to sublet "the premises" demised was not broken by the subletting part of them applied.

Dictum of Lord Eldon in *Church* v. *Brown* (1808) 15 Ves. 258, 265, as applied in *Grove* v. *Portal* [1902] 1 Ch. 727, followed.

Appeal from Judge Archer, sitting at Brighton and Lewes county court.

By an agreement in writing dated July 11, 1944, the appellant landlord let to the respondent tenant a dwelling-house. The agreement, signed by the tenant, was in the following terms: "re 53 Marine Avenue, Hove. I hereby agree to rent the above "house as from July 15, 1944, at the rate of 65*l.* per annum "exclusive of rates payable in advance on Saturday of each and "every week in the sum of 1*l.* 5*s.* and I further agree not to "sublet. It is agreed that the tenancy can be determined either "by me or by the landlord by giving four weeks' notice in writing "on any rent day".

The tenant sublet two of the top rooms of the house, and the landlord brought proceedings for possession in the county court alleging breach of the agreement not to sublet. The tenant, while prepared to admit that the subletting was a breach of the undertaking, claimed the protection of the Rent Restriction Acts.

The county court judge held that there had been no breach of the undertaking since in his view it applied only if the whole of the premises were sublet. He accordingly refused an order for possession.

The landlord appealed.

Michael Albery for the landlord.
W. Gumbel for the tenant.

The arguments sufficiently appear from the judgment.

Somervell, L.J., stated the facts and continued:—It will be logical first to refer to the authorities which really form the basis of the argument. The effect of them is thus stated in Foa, The General Law of Landlord and Tenant (7th ed.), p. 269: "A "covenant not to underlet 'the premises' demised is not broken "by underletting a part of them only". That principle that an undertaking not to sublet or to assign the premises is not broken by a sub-lease or assignment of part may be traced back to a dictum of Lord Eldon in *Church* v. *Brown* (1).

---

(1) (1808) 15 Ves. 258, 265.

There does not appear to have been much intermediate authority, but the point came before Joyce, J., in *Grove* v. *Portal* (2), which concerned the alleged parting with a part of fishing rights under a lease. There the covenant was "not to "underlet, assign, transfer, or set over, or otherwise by any act "or deed procure, the said premises to be assigned, transferred", etc. Joyce, J., referred to the dictum of Lord Eldon (3), and said that, so far as he knew, it had never been disapproved, and that it was quoted in the textbooks and considered by the authors to be the law. He then referred to the principle laid down in *Crusoe* v. *Bugby* (4), that, "the courts have always held a strict "hand over these conditions for defeating leases" (5); and he applied the principle.

That principle, where the words "the premises", or, no doubt, similar words describing the whole of what is demised, are present, is not in any way challenged or disputed by Mr. Albery for the landlord. Indeed, he referred to a case in the House of Lords where it was assumed, from the way in which the decision was arrived at and as shown by the speeches, to be the law. In the present case the agreement was in these terms [His Lordship read it]. It will be noticed that there are no words such as "the premises" after the words "I further agree not to sublet"; and Mr. Albery submits that that undertaking should be construed so as to cover a sublease of part of the premises. Joyce, J., in *Grove* v. *Portal* (6), said in effect that covenants of this kind must be construed strictly; in other words, that the tenant's prima facie right to assign or sublet is not to be cut down unless clear words are used.

From the county court judge's note it is clear that he had that point in mind, for he referred to *Russell* v. *Beecham* (7), a decision of this court, where a somewhat similar point was raised. Bankes, L.J., there said (8): "I think this court ought to follow "the guidance of *Crusoe* v. *Bugby* (9) [referred to by Joyce, J., "in *Grove* v. *Portal* (6)] and *Doe* v. *Hogg* (10), and hold that "the lessor not having made plain beyond question the intention "that mere parting with possession should be a cause of forfeiture the lessee is entitled to succeed and the appeal must be "dismissed". Atkin, L.J., adopted the same principle and also referred to the covenant as one which if broken entails a forfeiture. Mr. Albery says that that principle ought not necessarily to be applied in its strictness in the present case because here there was no proviso for re-entry. In certain circumstances

(2) [1902] 1 Ch. 727.
(3) Ibid. 731.
(4) (1771) 2 Wm. Bl. 766.
(5) Ibid. 767.
(6) [1902] 1 Ch. 727.
(7) [1924] 1 K. B. 525.
(8) Ibid. 534.
(9) 2 Wm. Bl. 766.
(10) (1824) 4 D. & R. 226.

there might be force in that: on the other hand it would be very inconvenient if words which had been construed in a certain sense over a great number of years were to be given a different meaning according as whether there was or was not a proviso for re-entry. Although both the Lords Justices in *Russell* v. *Beecham* (11), referred to forfeiture, it is, I think, also true that the principle of what I would call the strict construction is based on the consideration to which I have already referred, that the tenant's rights are not to be cut down except by clear words.

I think that this case does depend on the application to the words used of the principle that a covenant not to sublet " the " premises " is not broken if parts only are sublet. It is easy to imagine the point having been decided the other way: it is a forcible argument that, if a lessee covenants not to sublet " the " premises ", that covers any sublease carved out of the lease in which the covenant is to be found. The courts have construed the covenant otherwise and those decisions must stand and be applied. I think that the words " to sublet " in this lease must have an object and that the only possible object that they can be given is " the above house "—" I further agree not to sublet the " above house ". I do not think that the words " not to sublet " can be construed as meaning " I further agree not to sublet the above " house or any part of it, or make any sublease in relation to it ": all that can be implied is " the above house ". I think that this case falls under the principle stated by Lord Eldon in *Church* v. *Brown* (12), that a sublease of part of premises is not a breach of the covenant against subletting them. The appeal should be dismissed.

Jenkins, L.J. I agree. It is certainly too late in the day to question the principle that a covenant not to underlet " the " premises " in a tenancy agreement is not broken by an underletting of part. That principle was treated as well established by Lord Eldon in *Church* v. *Brown* (12) and has been acted on or accepted as good law in a number of cases to which we have been referred. That being so, the result of this appeal must turn on the construction of the document of tenancy; and if on the true construction of it the prohibition against subletting is a prohibition against subletting " the premises " then, on the well-established principle, a subletting of part is no breach. In my view, upon the natural and ordinary construction of the document in question, it is reasonably plain that what the tenant agreed not to sublet was the subject-matter of the tenancy, that is to say, 53 Marine Avenue, Hove, a reference to which appears at

(11) [1924] 1 K. B 525. (12) 15 Ves. 258, 265.

the top of the document and which is referred to in the body of the document as " the above house ", and might equally well have been termed " the above premises ". If that is the true construction of the document, it follows that, on the principle referred to, there has been no breach of the agreement not to sublet. I agree with the submission made by Mr. Gumbel that if the natural and ordinary meaning of the words can be satisfied by treating " the above house ", or 53 Marine Avenue, Hove, as the object of the words " not to sublet ", there is no justification for treating the object as including also any part of the premises. On the contrary, any doubt should be resolved in favour of the tenant whose prima facie right to dispose as he thinks fit of the interest vested in him under the tenancy is cut down by the stipulation in question.

I agree that the appeal fails.

Birkett, L.J. I agree. The point as originally put before the court appeared to be simple, but, as the argument developed, one or two subtleties emerged. In the result the matter really turns on the construction of the words of the document of July 11, 1944, " and I further agree not to sublet ". Mr. Albery says that the proper and natural construction of those words is: " I " further agree not to sublet at all " or " I further agree not to " sublet the premises or any part of them ". That construction would amount to an absolute prohibition of any kind of subletting. Mr. Gumbel, on the contrary, says that the natural construction of the words " I hereby agree to rent the above " house . . . and I further agree not to sublet " is " I further " agree not to sublet the above house "—the house, as Jenkins, L.J., said, being the subject-matter of the tenancy—and if that is the natural and proper construction to be placed on the words then it is quite clear that the principle that a covenant not to underlet the premises demised is not broken by underletting part of them only applies fully here. It was stressed in the county court that the lease did not say " not to sublet any part ". The judge held that this was an undertaking not to sublet simply, and therefore did not cover a subletting of the part.

In my view the proper construction to be put upon the words is that for which the tenant contends.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Boxall & Boxall for Edwin Boxall & Kempe, Brighton; Carpenter & Oldham, Brighton.*

MILLS *v.* BRYCE.

C. A.

1950
Nov. 21;
Dec. 4.

Somervell, Jenkins and Birkett, L.JJ.

Landlord and Tenant—Rent restriction—Standard rent—Rent including rates—Increase of rates resulting in corresponding increase in rent—Whether "permitted increases"—Standard rent not exceeded—Whether statutory tenancy created—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-s.* 1 (*b*), *s.* 3, *sub-s.* 2.

At the time when a tenant paid the rates of a flat subject to the Rent Restriction Acts, the standard rent was x*l.* The landlord of the flat granted a lease to a new tenant at a higher rent, but by the lease the landlord undertook to pay the rates. After deducting from the amount of the new rent the amount payable for rates by the landlord, the balance was less than x*l.* By this transfer of burden, previously borne by the tenant, to the landlord, the terms under which the dwelling-house was held were not less favourable to the tenant, and so the increase of rent was deemed not to be an increase of rent for the purpose of the Rent and Mortgage Interest (Restrictions) Act, 1920: see s. 2, sub-s. 3.

Subsequently during the tenancy there were three increases and one decrease of rates, and in each case the rent was increased or decreased by the amount of that increase or diminution, and the Court of Appeal found that the tenant agreed to these changes in the rent. But, throughout the tenancy, if at any time the amount payable as rates had been deducted from the rent, the balance would have been less than x*l.*

These facts were proved on an application by the landlord for possession of the flat. The tenant had died. The landlord had given him notice to quit before his death, and the notice expired after his death. The deceased tenant's daughter claimed to be "tenant" of the flat by virtue of s. 12, sub-s. 1 (*g*), of the Act of 1920, and that issue depended on whether the deceased was a contractual or a statutory tenant. That issue, in turn, depended on whether notices of increase of rent should have been given by the landlord to the tenant under s. 3, sub-s. 2, of the Act of 1920, in which case the tenancy would have been a statutory tenancy.

Held, following *Phillips* v. *Copping*, [1935] 1 K. B. 15, that in the case of each increase of the rent due to the increase of rates, the landlord, under her common-law right, could have served on the tenant a notice to quit, and offered the tenant a fresh tenancy at the former standard rent, i.e., x*l.*, plus the amount of the rates; and the parties were entitled to agree the altered rent on that basis. No statutory notice under s. 3, sub-s. 2, of the Act of 1920 was required of an increase of rent to an amount less than or not exceeding the standard rent x*l.* since that was not a "permitted increase" of the standard rent. Accordingly, the tenancy was contractual and an order for possession should be made.

APPEAL from Judge Tylor, K.C., sitting at Southampton county court.

C. A.
1950
MILLS
v.
BRYCE.

On July 3, 1939, a flat in Southampton within the Rent Restriction Acts was let at an annual rent of 58*l.* 10*s.* 0*d.*, the tenant, one Gilbertson, paying the rates. Prima facie that tenancy determined the standard rent of the flat. That tenant gave up his tenancy, and the plaintiff landlord on July 6, 1942, let the flat to a Major Bryce, the father of the defendant, at a rent of 6*l.* 10*s.* 0*d.* a month—78*l.* a year—the landlord paying the rates, which at that date were 28*l.* 7*s.* 0*d.*, there having thus been a transfer of burden. Addition of the standard rent of 1939, 58*l.* 10*s.* 0*d.*, to the amount of the rates, 28*l.* 7*s.* 0*d.*, making 86*l.* 17*s.* 0*d.*, showed that the tenant, at 78*l.* a year, was paying less than the standard rent.

During the continuance of the tenancy there were three increases of, and one decrease in, rates. When the rates increased the landlord claimed a corresponding increase of rent. When there was a reduction in rates she conceded a corresponding reduction in rent. No notices of the increase were served by the landlord: see sub-s. 2 of s. 3 of the Act of 1920 (1). On each

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2, sub-s. 1: "The amount by "which the increased rent of a "dwelling-house to which this Act "applies may exceed the standard "rent shall, subject to the provisions "of this Act, be as follows, that is "to say . . . (*b*) An amount not "exceeding any increase in the "amount for the time being payable "by the landlord in respect of rates "over the corresponding amount paid "in respect of the yearly, half-yearly "or other period which included" (in the case of a new control house) "September 1, 1939 . . .".

Sub-section 3: "Any transfer to a "tenant of any burden or liability "previously borne by the landlord "shall, for the purposes of this Act, be "treated as an alteration of rent, and "where, as the result of such a trans-"fer, the terms on which a dwelling-"house is held are on the whole "less favourable to the tenant than "the previous terms, the rent shall "be deemed to be increased, whether "or not the sum periodically payable "by way of rent is increased, and "any increase of rent in respect of "any transfer to a landlord of any "burden or liability previously borne "by the tenant where, as the result "of such transfer, the terms on "which any dwelling-house is held "are on the whole not less favour-"able to the tenant than the previous "terms, shall be deemed not to be "an increase of rent for the purposes "of this Act: Provided that, for the "purposes of this section, the rent "shall not be deemed to be increased "where the liability for rates is "transferred from the landlord to the "tenant, if a corresponding reduc-"tion is made in the rent".

Section 3, sub-s. 2: "Notwith-"standing any agreement to the "contrary, where the rent of any "dwelling-house to which this Act "applies is increased, no such "increase shall be due or recover-"able until or in respect of any period "prior to the expiry of four clear "weeks, or, where such increase is "on account of an increase in rates, "one clear week, after the landlord "has served upon the tenant a valid "notice in writing of his intention "to increase the rent, which notice "shall be in the form contained in "the first schedule to this Act, or "in a form substantially to the same "effect. If a notice served as afore-"said contains any statement or "representation which is false or "misleading in any material respect, occasion the rates paid by the landlord, when subtracted from the total rents paid by the tenant, left the landlord with less than 58*l*. 10*s*. 0*d*., the standard rent.

In February, 1949, the tenant went to hospital, and on May 4, 1950, he died. A notice to quit was served on him shortly before, and expired shortly after, his death. The landlord, by her action, claimed possession of the flat from the defendant, the tenant's daughter, in the county court. The defendant claimed to retain possession of the flat as a " tenant " under s. 12, sub-s. 1 (*g*), of the Rent and Mortgage Interest (Restrictions) Act, 1920, which she could only do on the basis that her father, the tenant, had been a statutory tenant. Counsel for the defendant submitted that the effect of the transfer-of-burden section—sub-s. 3 of s. 2 of the Act of 1920—was exhausted when the " inclusive " rent was first fixed at 6*l*. 10*s*. 0*d*. a month, i.e., 78*l*. a year; that henceforward the landlord was entitled to that " inclusive " rent and no more, and could claim no addition on account of increased rates except by way of permitted increase (see s. 2, sub-s. 1 (*b*), of the Act of 1920); and that the service of the prescribed notice (see s. 3, sub-s. 2, of the Act of 1920) would have the effect of converting the contractual into a statutory tenancy: *Baxter* v. *Eckersley* (2).

The county court judge found that the landlord represented the increases of rents as increases in respect of rates which she was entitled to make and that, though the tenant never agreed to a modification of his tenancy agreement, he submitted. The judge drew the conclusion that this made necessary the service of statutory notices under sub-s. 2 of s. 3 of the Act of 1920 and that the tenancy was a statutory tenancy. Having decided other points in favour of the tenant's daughter, the defendant, he refused to make an order for possession.

The landlord appealed.

The sole question argued in the Court of Appeal was whether the defendant's father, the tenant, was, at his death, a contractual or a statutory tenant.

Robert Hughes and *D. H. Stansfeld* for the landlord. The tenancy of this flat was never a statutory tenancy. Although, in 1942, there had been a transfer of burden, previously borne by the tenant, from the tenant to the landlord within the meaning of s. 2, sub-s. 3, of the Rent and Mortgage Interest (Restrictions)

" the landlord shall be liable on summary conviction to a fine not " exceeding £10 unless he proves that " the statement was made innocently " and without intent to deceive. " Where a notice of an increase of " rent which at the time was valid " has been served on any tenant, the " increase may be continued without " service of any fresh notice on any " subsequent tenant ".

(2) [1950] 1 K. B. 480.

Act, 1920, the terms under which the dwelling-house was held were not less favourable to the tenant, and so by virtue of that sub-section the (nominal) increase of rent was deemed not to be an increase of rent for the purposes of the Act of 1920. In *Winchester Court Ld.* v. *Miller* (3), approved by the House of Lords in *Asher* v. *Seaford Court Estates Ld.* (4), it was held that the word " tenant " in sub-s. 3 of s. 2 included a former tenant, the demise to whom fixed the standard rent.

It is contended for the defendant that the three increases of rent subsequently made were invalid; that the tenant never agreed to them; and that, once the transfer of burden had been made in 1942, no subsequent rise in the total amount of rent could have been imposed by the landlord without her giving a notice under s. 3, sub-s. 2, of the Act of 1920.

But it is clear that the tenant agreed to pay these increases of the total rent, to the extent of the increase of rates. There is no evidence of any protest by him and he paid them. This was a contractual tenancy and the landlord was entitled to serve a notice to quit on the tenant and offer him a fresh tenancy at the standard rent, which was some 8*l.* higher than the rent she charged: see *Phillips* v. *Copping* (5), followed in *Rex* v. *Paddington and St. Marylebone Rent Tribunal* (6). With that right, she asked for an increase in the rent to the amount of the increase in rates, still leaving the tenant at a rent, less in amount than the standard rent, and the tenant agreed to this. And there was no necessity for the landlord to serve a notice on the tenant under s. 3, sub-s. 2, of the Act of 1920. That being so, this tenancy ended, as it had begun, as a contractual tenancy. These increases of rent—after 1942—were not made under the Act of 1920: they were made under the common-law right of the landlord to give notice to quit and to let at any rent up to the amount of the standard rent. The proviso to s. 2, sub-s. 3, of the Act of 1920 is: " Provided that for the " purposes of this section, the rent shall not be deemed to be " increased where the liability for rates is transferred from the " landlord to the tenant, if a corresponding reduction is made in " the rent ". This is the converse case. Here the liability for rates was transferred from the tenant to the landlord and a corresponding increase was made in the rent—on each occasion; and on each occasion the rent was not deemed to be increased: see Lord Normand's speech in *Asher* v. *Seaford Court Estates Ld.* (7).

This letting to the defendant's father was always at a rent below the standard rent. In that state of affairs increase of rent, proportionately to an increase of rates, is outside the Rent Restriction Acts and required no notices under s. 3, sub-s. 2, of the Act of 1920. Could the tenant have sued for the return of these increases in respect of rates? The answer is "No": there is no power under the Rent Restriction Acts for him to do so. At all material times the parties, landlord and tenant, were negotiating outside these, and the tenant was never asked to pay an amount of rent which was as much as the standard rent.

---

(3) [1944] K. B. 734.
(4) [1950] A. C. 508.
(5) [1935] 1 K. B. 15.
(6) [1948] 2 K. B. 413.
(7) [1950] A. C. 508, 519.

McCarraher for the defendant. If the court finds that the landlord should have given notices to the tenant under s. 3, sub-s. 2, of the Act of 1920, since the landlord in the county court claimed possession together with rent or mesne profits at the increased rent which the tenant had been paying, this was a statutory tenancy, and the decision in *Baxter* v. *Eckersley* (8) is conclusive in favour of the defendant.

The rent which the tenant paid on entering upon the tenancy was 78*l*., and that was 19*l*. 10*s*. 0*d*. more than the standard rent. No doubt, at the outset, there was a transfer of burden, for the liability that was previously on the tenant to pay the rates was transferred to the landlord. As Asquith, L.J., said in *Asher* v. *Seaford Court Estates Ld*. in the Court of Appeal (9), a passage cited by Lord Normand in the House of Lords (10): "In order "to bring the increase of rent within the relevant part of the "sub-section" (sub-s. 3 of s. 2) "so that it can be 'deemed' "not to be an unpermitted increase, the landlords must establish "four propositions: (i) that 'the terms on which the dwelling-"'house is held', though changed, 'are not less favourable to the "'tenant' than they were before the increase of rent; (ii) that "the change in the terms is the 'result' of 'a transfer to the "'landlord of a burden or liability'; (iii) that this 'burden or "'liability' was before the transfer 'borne by the tenant'; "(iv) that the increase in the rent is an increase 'in respect of "'the transfer' in question". But the effect of s. 2, sub-s. 3 —the transfer-of-burden sub-section—was then exhausted, when the inclusive rent of 6*l*. 10*s*. 0*d*. a month or 78*l*. a year was first fixed. Thenceforward, the landlord was entitled to that sum and no more, and she could claim no addition by reason of increase of rates except by way of permitted increase under the Rent Restriction Acts: see s. 2, sub-s. 1 (*b*), of the Act of 1920. This increase must be justified on each occasion and the statutory notice given under s. 3, sub-s. 2, of the Act of 1920. In 1942, acting on the transfer-of-burden sub-section, the landlord in effect said: "For the future, I will pay the rates, whatever they may

---

(8) [1950] 1 K. B. 480.
(9) [1949] 2 K. B. 481, 490.
(10) [1950] A. C. 508, 519.

"be", and, after that, every increase in rent due to increase in rates must be justified.

Stansfeld replied.

Cur. adv. vult.

Dec. 4. The following judgments were read:—

SOMERVELL, L.J. [after referring to the facts:] Other points were taken in the court below, but the sole point before us is whether the defendant's father was a contractual or a statutory tenant at his death. If the former, on authorities which need not be referred to, the defendant cannot claim the protection of s. 12, sub-s. 1 (*g*): if the latter, she can.

Section 2 of the Act of 1920 concerns permitted increases in rent. It provides inter alia that the rent may exceed the standard rent by an amount not exceeding any increase in the amount of rates payable by the landlord. (See s. 2, sub-s. 1 (*b*)). Section 3, sub-s. 2, provides that these "permitted" increases shall not be recoverable unless a notice in writing is served in the form contained in the first schedule or substantially in that form. It has been decided that if the rent is increased in accordance with this procedure the tenant ipso facto becomes a statutory tenant.

In *Baxter* v. *Eckersley* (11) a landlord demanded and obtained increases of rent to which he was entitled only if he served the statutory notices to which I have referred. No notices had been served. The tenant died leaving a widow who claimed the protection of the Acts which she was entitled to do if her husband had become a statutory tenant. In the proceedings the landlord claimed and obtained an order for the increased amount of the rent for use and occupation. He sought, however, to rely on the invalidity of his demands for the increased rent for the purpose of saying that the tenancy had remained a contractual tenancy. It was held that he could not in one and the same proceedings obtain two forms of relief based on inconsistent premises.

I can now state very shortly the nature of the issue. Over the period of the tenancy increases of rent were demanded and paid, to cover the landlord's increased liability for rates. No notices were served. Mr. Hughes for the appellant landlord submitted that notices were not necessary as the increases left the rent below the standard rent. Mr. McCarraher submitted that notices were necessary and that *Baxter* v. *Eckersley* (11) applied. The trial judge so held, and, deciding the other points in the defendant's favour, made no order for possession.

---

(11) [1950] 1 K. B. 480.

The flat in question in Southampton was let to a Mr. Gilbertson on July 3, 1939, at a rent of 58*l*. 10*s*. 0*d*., the tenant having to pay rates. This is the tenancy determining prima facie, at any rate, the standard rent. On July 6, 1942, the flat was let to the defendant's father on the basis of the landlord's bearing the rates. Section 2, sub-s. 3, of the Act of 1920 provides inter alia that " any increase of rent in respect of any transfer to a landlord " of any burden or liability, previously borne by the tenant, " where, as the result of such transfer, the terms on which any " dwelling-house is held are on the whole not less favourable to " the tenant than the previous terms, shall be deemed not to be " an increase of rent for the purposes of this Act ". In *Winchester Court Ld.* v. *Miller* (12), approved in the House of Lords in *Asher* v. *Seaford Court Estates* (13), it was held that the word " tenant " in the sub-section included a former tenant, the demise to whom fixed the standard rent. As rates fluctuate it seems to me to follow that the application of s. 2, sub-s. 3, to a case such as this results in a fluctuating standard rent.

I will take a rent of 50*l*., the tenant bearing the rates in the demise which settles the standard rent. The landlord assumes the burden of rates at a time when rates are 20*l*. A subsequent letting of 70*l*. will be on terms not less favourable to the tenant than the previous terms. If rates fall to 15*l*. the rent must be reduced or the terms will be less favourable. If they rise to 25*l*. a letting at 75*l*. would be a letting at the standard rent.

On July 6, 1942, when the landlord let to the defendant's father, the landlord undertook to pay the rates. The rates were at that time 28*l*. 7*s*. 0*d*. The standard rent was therefore, in my opinion, at that date 58*l*. 10*s*. 0*d*. plus 28*l*. 7*s*. 0*d*., that is 86*l*. 17*s*. 0*d*. The landlord let to the defendant's father at 6*l*. 10*s*. 0*d*. a month, that is for 78*l*. a year; that was below the standard rent. During the continuance of that tenancy, there were three increases and one decrease of rates. When the rates increased, the landlord claimed an increase of rent to cover the increase of rates, and when they were reduced she conceded a reduction. The position as found by the county court judge was that the landlord represented the increases as increases in respect of rates which she was entitled to make and that the tenant submitted. The rents as so adjusted were always below the rent permitted by the application of the " transfer-of-burden " sub-section.

The position when a landlord lets below the standard rent was considered in *Phillips* v. *Copping* (14). In that case on the

(12) [1944] K. B. 734.
(13) [1950] A. C. 508.
(14) [1935] 1 K. B. 15.

expiration of a tenancy at a rent below the standard rent, the landlord served a notice increasing the rent to the standard rent and adding thereto permitted increases. It was held that he could do so. Maugham, L.J., said (15): "There is nothing to "show that the common law right of the landlord to terminate "an existing tenancy and to fix the rent for the new tenancy "at the standard rent is taken away".

It seems therefore clear that the landlord here could have served a notice to quit, and offered a fresh tenancy at the standard rent, which was some 8*l.* higher than the rent she charged. It also seems clear that the parties could have agreed the increases which the landlord demanded. The county court judge found that Major Bryce never agreed to a modification of the tenancy agreement and he states the position, as I have summarized it above. He draws the conclusion that this made necessary the service of statutory notices. I do not regard the case as an easy one, but I have come on both points to a different conclusion.

I agree that a lawyer familiar with the decision in *Phillips* v. *Copping* (14) would have put the matter more explicitly than did the landlord here. Taking the judge's findings, it was substantially accurate to say that the increases were increases which the landlord was entitled to make. If the tenant had insisted on the formality of a notice to quit, the landlord might have considered her rights and demanded more than she did in fact demand. The proper conclusion, I think, is that the tenant, by paying the rent, did in fact agree to a variation.

In any event I do not think that the statutory notices under s. 3, sub-s. 2, of the Act of 1920 were required. The main scheme of the Act, as appears from s. 1, is to make irrecoverable any amount in excess of permitted increases over the standard rent. The opening words of s. 2 concerning permitted increases refer to the amount by which the rent may exceed the standard rent. The opening words of sub-s. 2 of s. 3 "notwithstanding "any agreement to the contrary" indicate that the necessity for notices does not apply to increases below the standard rent which, as *Phillips* v. *Copping* (14) shows, the parties can agree. On the most technical view of the transaction the utmost that could have been suggested was that the landlord obtained the increase by a misrepresentation which was plainly an innocent misrepresentation. She said: "I am entitled to demand this "increase". She should have said: "by serving a notice to "quit I can demand this increase if you wish to remain a "tenant". By using the word "misrepresentation" I am not suggesting that it was such a misrepresentation as would have given the tenant any legal rights. That point does not arise.

(14) [1935] 1 K. B. 15.

(15) Ibid. 23.

For these reasons I have come to the conclusion that the tenancy remained a contractual tenancy, and the appeal must be allowed.

JENKINS, L.J. I agree. The crucial question in this case is whether Major Bryce's tenancy of the flat had become statutory or was still contractual at the date of the tenant's death. This question is not free from difficulty, but I think the right answer is that the tenancy was then still contractual. The standard rent of the flat as determined by reference to the letting to Mr. Gilbertson on July 3, 1939, was 58*l*. 10*s*. 0*d*. a year, exclusive of rates, which were payable by the tenant. It follows that, on the letting to the defendant's father on July 6, 1942, it was open to the landlord to charge whatever " exclusive " rent she pleased not exceeding 58*l*. 10*s*. 0*d*. a year, the tenant remaining liable for rates, or at her option to assume the liability for rates and make a corresponding addition to the rent charged as " inclusive " of rates ". In the latter alternative the addition to the rent, provided it did not exceed the contemporary amount of the rates for which liability was assumed by the landlord, would under the " transfer-of-burden " provisions contained in s. 2, sub-s. 3, of the Act of 1920 be deemed not to be an increase in rent for the purposes of the Rent Restriction Acts. Further, I think it was open to the landlord, on the letting to the defendant's father, to assume liability for rates and provide for periodical fluctuations in their amount by charging an " inclusive " rent not exceeding in total annual amount 58*l*. 10*s*. 0*d*. plus the amount of the rates from time to time payable by the landlord, as this arrangement would be on the whole not less favourable to the tenant than the previous terms, inasmuch as she would be out of pocket in " inclusive " rent no more than would have been payable under the terms of Mr. Gilbertson's tenancy in the form of " exclusive " rent plus rates, and the requirements of s. 2, sub-s. 3, of the 1920 Act would thus be automatically satisfied, year by year, whatever the rates might amount to.

It does not however appear from the evidence that the agreement as to rent on the letting to the defendant's father included any provision as to subsequent variations in the amount of the rates. The rent agreed seems to have been simply 6*l*. 10*s*. 0*d*. a month inclusive of rates, which were to be paid by the landlord. But this was well within s. 2, sub-s. 3, of the Act of 1920, since 6*l*. 10*s*. 0*d*. a month = 78*l*. a year, and the rates then amounted to 28*l*. 7*s*. 0*d*., so that the rent less the amount attributable to rates was at the rate of only 49*l*. 13*s*. 0*d*. a year as compared with the 58*l*. 10*s*. 0*d*. rent plus liability for rates under the terms of the Gilbertson tenancy.

The difficulty arises as regards the subsequent increases in rent from time to time made to correspond with the subsequent increases in rates. After allowing for these increases, the rent from time to time charged was always well within the yearly figure arrived at by adding to the " exclusive " standard rent of 58*l*. 10*s*. 0*d*. the amount of the rates from time to time payable by the landlord. It would therefore seem to follow, again applying s. 2, sub-s. 3, of the Act of 1920, that there was here no increase in rent for the purposes of the Rent Restriction Acts.

It is however argued on behalf of the defendant that the effect of s. 2, sub-s. 3, was exhausted when the " inclusive " rent was first fixed at 6*l*. 10*s*. 0*d*. a month. Thenceforward, it is said, the landlord was entitled to that inclusive rent and no more and could claim no addition on account of increased rent except by way of permitted increase under the Acts (see s. 2, sub-s. 1 (*b*), of the Act of 1920) and on service of the prescribed notice (see s. 3, sub-s. 2), which would have had the effect of converting the tenancy from a contractual to a statutory one.

But I think the fallacy in this argument is that it treats the " inclusive " rent of 6*l*. 10*s*. 0*d*. a month as if it had been the standard rent, which it was not. The standard rent here in question was 58*l*. 10*s*. 0*d*. a year exclusive, and the landlord could charge any rent she chose not exceeding that amount plus the amount of the burden assumed by her in respect of rates. If, on the occasion of each of the increases in rent with which we are here concerned, there had been a change of tenant and a new agreement with such tenant for payment of the increased rent, I apprehend the agreement would have been perfectly lawful so far as the Rent Restriction Acts were concerned, for the amount charged, after allowing for the transfer of burden to the landlord in the shape of rates, would have been well within the standard rent, if the burden transferred is to be measured, as I think it should be (see *Asher* v. *Seaford Court Estates Ld.* (16)), by reference to the terms of the earlier tenancy of July, 1939.

If the increases here made were open to any objection, it was not, I think, that the Acts precluded them from being made, except as " permitted increases " in the standard rent and after service of the prescribed notice, because if I am so far right they were not increases in the standard rent at all. The objection (if any) was, as it seems to me, that the landlord, having agreed once and for all an " inclusive " rent of 6*l*. 10*s*. 0*d*. a month, had thereafter to pay the rates whatever they might amount to, and could not as a matter of contract demand any increase

(16) [1950] A. C. 508.

because the rates happened to go up. But this purely contractual objection cannot, so far as I can see, avail the defendant. The increases, when demanded, were in fact paid. It may be this was done under a mistake as to the terms of the agreement. It may be that it was done because, irrespective of the legal rights, it was recognized as reasonable that the tenant should bear any increase in rates. One is tempted to think (especially in view of the decrease in rent allowed on one occasion when the rates were reduced) that the true agreement between the parties may have been that the tenant should bear any increase and take the benefit of any reduction in the rates. Of that, however, there is no evidence.

But whatever the true explanation of the tenant's acquiescence in those increases may have been, the fact in my view remains that the amount he paid never exceeded the amount which so far as the Rent Restriction Acts were concerned he could lawfully agree to pay—that is, the standard "exclusive" rent plus the amount of the burden in the shape of rates transferred to the landlord. Looking at the substance of the matter, he was never out of pocket more than he would have been if he had paid the "exclusive" standard rent of 58*l*. 10*s*. 0*d*. and borne the rates himself. In fact he was in pocket by comparison.

Accordingly, I agree that the tenancy remained contractual down to the date of the tenant's death, with the result that, as the notice to quit had not then expired, the defendant cannot claim the benefit of s. 12, sub-s. 1 (*g*), of the Act of 1920, and that the appeal should therefore be allowed.

BIRKETT, L.J. I am in complete agreement with the judgments which have just been delivered.

Appeal allowed.

Solicitors: *White & Leonard, for Hallett, Martin & Lebern, Southampton; Carter & Barber, for Ewing, Hickman & Clark, Southampton.*

C. G. M.

C. A.

1950
Oct. 30, 31;
Nov. 1, 2,
27.

Somervell,
Cohen and
Denning, L.JJ.

JAWORSKI *v.* INSTITUTION OF POLISH ENGINEERS IN GREAT BRITAIN LD.

[1948 J. 3728.]

Revenue—Contract of service—P.A.Y.E.—Remuneration to be fixed sum per month—" Without any deductions and taxes, which will be " borne by the employers—Words point to a gross sum—R. 23 (2.) *of the All Schedules Rules in the First Schedule to the Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40)*—Question whether r.* 23 (2.) *applies to salaries—Income Tax (Employments) Act*, 1943 (6 *&* 7 *Geo.* 6, *c.* 45), *s.* 1.

By r. 23 of the All Schedules Rules in the First Schedule to the Income Tax Act, 1918: " (1.) A person who refuses to allow a " deduction of tax authorised by this Act to be made out of any " payment, shall forfeit the sum of fifty pounds. (2.) Every agreement for payment of interest, rent or other annual payment in " full, without allowing any such deduction, shall be void ".

In January, 1943, the plaintiff, a Polish subject, entered into the service of the defendants, an official body under the Polish Government in London. The oral agreement of service, as evidenced by a letter from the plaintiff to the defendants, was that " my " remuneration will amount to 20*l.*" (by the material time, raised to 36*l.*) " net per month, payable in advance . . . without any deduc" tions and taxes which will be borne by the Association ", the defendants. In 1943 the defendants' employees were treated as having immunity in respect of British income tax. But by 1946 the defendants' employees had become liable to British income tax. The defendants for the year 1946–7 made deductions from the plaintiff's salary on the basis that his remuneration was 36*l.* a month, acting under the Income Tax (Employments) Act, 1943, by s. 1 of which income tax in respect of certain emoluments assessable to tax is to be deducted by the person making the payment. The plaintiff now claimed to recover the sums deducted from the 36*l.* a month, on the ground that, on the true construction of his service agreement, he was entitled to a gross emolument which, after the proper deductions had been made, including income tax, would leave him a net sum of 36*l.* a month. The trial judge found that, by reasons of r. 23 (2.) the service agreement was void.

Held, (1.) that, on the facts, the taxes referred to in the service agreement were not only Polish taxes, but included British income tax, and (2.) that the plaintiff's construction of his service agreement was correct. The court was entitled to have regard to the fact that the service agreement was not an instrument drawn by lawyers. The words of the letter which pointed to the plaintiff's remuneration being a grossed-up sum were the last words " taxes which will be borne by the Association ".

The court expressed grave doubt whether annual payments within the meaning of r. 23 (2.) included salaries or remuneration for

C. A.

1950

JAWORSKI
v.
INSTITUTION
OF POLISH
ENGINEERS
IN GREAT
BRITAIN LD.

employment under Sch. E, and also in seeing how that rule could be applicable except in cases when the deduction was permissive and not mandatory.

Decision of Finnemore, J., reversed.

APPEAL from Finnemore, J.

In January, 1943, the plaintiff, a Polish subject, entered the service of the defendants—an official body under the Polish Government in London. The agreement of service made orally on January 4, 1942, was confirmed by letter dated January 8: " Dear Colleague, With reference to our conversation regarding " proposed work in the office of the Association, I beg to inform " you that I agree with the proposal made to me, namely: my " remuneration will amount (during the initial period, which I " treat as a trial period) to 20*l.* net per month, payable in " advance, later increased to 25*l.* net, per month, without any " deductions and taxes, which will be borne by the Association. " I dare say that I do not deem the remuneration of 25*l.* to be a " final one and I hope that after finding out my usefulness by " the Association, my remuneration will not be lower than salaries " of other employees at the Association's office. . . . Questions " regarding holiday and notice of employment are based on the " provisions relating to Polish civil servants ".

At that time the employees of the defendants were treated as having immunity in respect of income tax. The amount of 20*l.* net monthly remuneration stated in the letter was raised to 36*l.* By May, 1946, the plaintiff with other employees of the defendants became liable to British income tax. It was not disputed that the emoluments of the plaintiff fell within the Income Tax (Employments) Act, 1943, which with the regulations made thereunder established the system known as P.A.Y.E. Under s. 1 of that Act it is provided that on the making of any payment of any emoluments covered by the Act, income tax shall, subject to and in accordance with regulations to be made, be deducted by the person making the payment. In the year in question the defendants proceeded to make the appropriate deductions on the basis that the plaintiff's emoluments were 36*l.* a month. The plaintiff claimed that on the true construction of his agreement he was entitled to emoluments which would, after the proper deduction including taxes had been made, leave a sum of 36*l.* The claim against the defendants was for tax sums deducted from 36*l.* per month in the year 1946–7 which had regard to the allowances to which the plaintiff was entitled.

C. A.
1950

JAWORSKI
v.
INSTITUTION
OF POLISH
ENGINEERS
IN GREAT
BRITAIN LD.

Finnemore, J., gave judgment for the defendants holding that by reason of r. 23 (2.) of the All Schedules Rules in the First Schedule to the Income Tax Act, 1918, the provision in the service agreement to pay a net sum, free of tax, was void (1).

The plaintiff appealed.

Maurice Berkeley for the plaintiff. The agreement between the plaintiff and the defendants was that his remuneration would amount to 20*l*. net, now 36*l*. net, per month, payable in advance without any deductions and taxes which would be borne by the Association. If appropriate words are used a payer can provide that the payee gets a fixed sum, the payer paying taxes. The payer covenants to pay a sum, which after deduction of tax, leaves the fixed sum: *Booth* v. *Booth* (2). This is clear law, but in view of decisions of the courts the words used must point to a gross sum. That is so here. There is no doubt about the intentions of the parties or as to the meaning of the contract, the relevant clause ending with these words: "without any "deductions and taxes, *which will be borne by the Association*". The court will recognize that the parties making the contract were not lawyers, nor even British subjects.

If a man's wages are 10*l*. a week and his employer agrees not to deduct income tax he has contravened s. 1 of the Income Tax (Employments) Act, 1943, and there is no need to invoke r. 23 (2.) of the All Schedules Rules contained in the First Schedule to the Income Tax Act, 1918 (3). But there is nothing to prevent an employer from contracting with his employee that his wage shall be such a gross sum that, after deduction of tax, there shall remain 10*l*.

Finnemore, J., held that, by reason of r. 23 (2.) of the All Schedules Rules, the provision in the service agreement to pay a net sum free of tax was void (4). In effect, the agreement was to pay a gross sum which after due deduction of tax would leave 36*l*. a month. The defendants have broken their contract, which was: (1.) that they should pay the tax, and (2.) that after this deduction of tax the plaintiff should receive 36*l*. clear each month.

---

(1) [1950] W. N. 262.

(2) [1922] 1 K. B. 66.

(3) All Sched. Rules of the First Sched. to the Income Tax Act, 1918, r. 23: "(1) A person who "refuses to allow a deduction of tax "authorized by this Act to be made "out of any payment shall forfeit "the sum of fifty pounds; (2) Every "agreement for payment of interest, "rent or other annual payment in "full without allowing any such "deduction shall be void".

(4) [1950] W. N. 262.

It is submitted that r. 23 of the All Schedules Rules does not apply to salaries or remuneration for employment under Sch. E. But, if that proposition is wrong, r. 23 does not affect the position here. If the salary of the plaintiff had been 36*l.* a month and the parties had agreed that there should be no deduction for tax from it, that might be a breach of r. 23 (2.), rendering the agreement void. But that is not so here: the agreement was for payment to the plaintiff of a total sum of 36*l.* plus tax—that the tax should be deducted and borne by the defendants—"the "Association"—and that the plaintiff should receive the net sum of 36*l.* a month. The defendants have not paid him that sum, and the plaintiff is entitled to recover it for each month during the relevant period, less the amounts already paid to him. Finnemore, J., at the trial relied on *In re Saunders* (5), but it is difficult to see how that decision has any bearing on the issue here.

It cannot be suggested that r. 23 (2.) is applicable unless the deduction is permissive, and the only permissive deduction under Sch. E before the P.A.Y.E. scheme came into force was in respect of railway companies: see r. 7 of Sch. E. Yet in *North British Ry. Co.* v. *Scott* (6), although there was there a reference to the company's contractual liability to deduct, it was not suggested that such a liability was void under r. 23 (2.). It is plain that profits of employment are not annual payments, within this sub-rule.

[SOMERVELL, L.J. It was not necessary in that case to decide whether r. 23 (2.) applied.]

There is nothing in income-tax law to prevent the defendants from paying, out of the gross sum earned by the plaintiff, his income tax. There never has been a general prohibition of tax-free salaries: see *Hartland* v. *Diggines* (7). Compare s. 189 of the Companies Act, 1948, which prohibits tax-free payments to directors of companies. As to statutory deductions, r. 19 is permissive and r. 21 mandatory. Rule 21 of the All Schedules Rules only applies to payments under Sch. D, and, though that is not stated in r. 19, the effect of the cases is that this rule also applies only to payments under Sch. D. [*Hill* v. *Gregory* (8) and *In re Jane's Settlement* (9) were also referred to.]

Sir Rowland Burrows, K.C., *Stogdon* and *Miss Plunkett* for the defendants. In January, 1942, the plaintiff was not subject

---

(5) [1898] 1 Ch. 17.
(6) [1923] A. C. 37.
(7) [1926] A. C. 289.
(8) [1912] 2 K. B. 61.
(9) [1918] 2 Ch. 54.

C. A.

1950

JAWORSKI v. INSTITUTION OF POLISH ENGINEERS IN GREAT BRITAIN LD.

to British income tax, and the agreement between the plaintiff and the defendants was made solely with regard to Polish taxes: see *In re Norbury* (10), *In re Frazer, Frazer* v. *Hughes* (11) and *In re Dunville* (12).

If that is not so, the defendants, by virtue of the Income Tax (Employments) Act, 1943, and the regulations made under it were bound to make the deductions which the inspector of taxes directed them to make. They had no option but to do so.

[SOMERVELL, L.J. You were bound to make deductions from the salary of the plaintiff, but what is contended is that you have miscalculated the salary from which you were bound to make deductions.]

The defendants were bound to make these deductions: see *In re The School for the Indigent Blind at Liverpool* (13).

The Income Tax Act, 1918, was a consolidating Act, therefore the court, in considering the ambit and meaning of r. 23 of the All Schedules Rules in the First Schedule to the Act of 1918, must refer to s. 103 of the Act of 1842, the predecessor of r. 23, to see what was the aim of the legislature. It covers annual payments mentioned in Sch. E. And r. 23 is found in the All Schedules Rules. Rule 23 therefore applies to salaries or remuneration under Sch. E, and the emoluments to which s. 1 of the Income Tax (Employments) Act, 1943, applies are all emoluments assessable to income tax under Sch. E. See also s. 26, sub-s. 1, of the Finance Act, 1941, and reg. 24 of the Income Tax (Employments) Regulations, 1944.

By r. 23 (2.) this agreement between the plaintiff and the defendants was void, since it was an agreement for payment of an annual payment in full without allowing any deduction for income tax: see *In re Gretton's Indenture* (14) and *Blount* v. *Blount* (15).

[SOMERVELL, L.J., referred to the judgment of Tomlin, J., in *In re Gordon's Settlement* (16).]

The real issue is what was the contract here. The remuneration was to be 20*l.* net, now 36*l.* net, "per month, payable in "advance . . . without any deductions and taxes, which will be "borne by the Association". The plaintiff has been assessed as a person receiving an income of 36*l.* a month, and the provision in the contract is that the tax on the 36*l.* is not to be deducted.

(10) [1939] Ch. 528.
(11) [1941] 1 Ch. 326.
(12) [1947] N. I. 50, 64.
(13) [1898] 2 Ch. 669.
(14) [1923] 1 Ch. 77.
(15) [1916] 1 K. B. 230.
(16) [1924] 1 Ch. 146, 149.

If the plaintiff contends that r. 23 (2.) does not apply, he can only do so by re-drafting the contract. Unless that is done the contract offends against r. 23 (2.) and is void. The plaintiff contends that his income is the grossed-up sum which, on deduction of tax, will leave him a clear 36*l*. It is clear that this is not the meaning of the contract.

As Finnemore, J., said, this agreement could not be construed as an agreement for a gross sum unless that were provided in quite plain terms. If the taxpayer wishes to obtain the benefit of that favourable position, he must make it quite clear in his contract that his income is the grossed-up sum. The contract is that the plaintiff's remuneration is to be " 36*l*. net per month ". The authorities show that this cannot mean a grossed-up sum.

Maurice Berkeley replied.

[The following cases also were cited:—*In re Maclennan* (17); *In re Tatham, Decd.* (18); *In re Pettit* (19); *In re Kingcome* (20) and *In re Eves* (21).]

Cur. adv. vult.

Nov. 27. SOMERVELL, L.J., reading the judgment of the court, stated the facts, and continued:—The first submission made by Sir Roland Burrows on behalf of the defendants was that the word " taxes " referred to in the plaintiff's letter of January 8, 1942, were only Polish taxes. He emphasized that at that time the plaintiff was not liable to British income tax. The trial judge did not accept this. He said: " I am not in " agreement with that argument. I think that the words are " quite general. Whether Mr. Reicher ", representing the defendants, " addressed his mind to English income tax or not, it is " quite plain that the plaintiff did, and I think on those general " words—if the agreement is valid at all—it is valid in regard to " English income tax, as it would be, or might have been, valid " in regard to Polish income tax had such a tax been levied, as " it might have been, while their Government was situated in " this country ". The reference to the plaintiff's concern with British income tax refers to his evidence that he had been paying British income tax, and referred to this in the conversation. We see no reason for differing from the judge on this point.

An intention that an employee or annuitant should get a certain sum, irrespective of variations in income tax, is common.

---

(17) [1939] Ch. 750.
(18) [1945] Ch. 34.
(19) [1922] 2 Ch. 765.
(20) [1936] Ch. 566.
(21) [1939] Ch. 969.

C. A.
1950

JAWORSKI v. INSTITUTION OF POLISH ENGINEERS IN GREAT BRITAIN LD.

Such an intention would seem to appear on the face of this document. The difficulties here arise from certain provisions of the Income Tax Act, 1918, and their application to words, which on the face of them appear to show such an intention, but have been held not to effect it. The principle by which tax is deducted at the source is applicable to a number of payments. The most familiar examples are to be found in rr. 19 and 21 of the All Schedules Rules to be found at the end of the First Schedule to the Income Tax Act, 1918.

Leaving out words which do not matter, r. 19 (1.) provides: "Where any yearly interest or money, annuity, or any other "annual payment . . . is payable wholly out of profits or gains "brought into charge to tax, no assessment shall be made upon "the person entitled to such interest, annuity, or annual pay- "ment, but the whole of these profits or gains shall be assessed "and charged with tax on the person liable to the interest, "annuity, or annual payment . . . and the person liable to make "such payment . . . shall be entitled, on making such payment, "to deduct and retain thereout a sum representing the amount "of the tax thereon . . .".

Rule 21 (1.) provides: "Upon payment of any interest of "money, annuity, or other annual payment charged with tax "under Schedule D . . . not payable or not wholly payable out "of profits or gains brought into charge, the person by or through "whom any such payment is made shall deduct thereout a sum "representing the amount of the tax thereon . . .". It will be noticed in r. 19 the words as to deduction are permissive and in r. 21 mandatory.

Rule 23 provides: "(1.) A person who refuses to allow a "deduction of tax authorised by this Act to be made out of any "payment, shall forfeit the sum of fifty pounds. (2.) Every "agreement for payment of interest, rent, or other annual pay- "ment in full without allowing any such deduction shall be "void". There was argument in the court below and before us whether r. 23 (2.) applied to deductions "authorized" from salaries or emoluments for services. Are they or are they not annual payments within the rule? We find a difficulty in seeing how r. 23 (2.) can be applicable, except in cases when the deduction is permissive: see *Blount* v. *Blount* (22). If this is right, no assistance can be had from *North British Railway Co.* v. *Scott* (23), which concerned a "right to deduct" given to

---

(22) [1916] 1 K. B. 230, 234.

(23) [1923] A. C. 37.

C. A.

1950

JAWORSKI
v.
INSTITUTION OF POLISH ENGINEERS IN GREAT BRITAIN LD.

railway companies. In the present area, if a man's wages are of an amount which brings them within the P.A.Y.E. scheme and the employer agrees not to deduct income tax, the agreement would be a direct contravention of s. 1 of the Income Tax (Employments) Act, 1943, which I have quoted, and there would seem no need to resort to r. 23 (2.).

It has been clearly established that if appropriate words are used a payer can so provide that the payee gets year by year a fixed sum. The payer covenants to pay a sum which after deduction of tax leaves the sum that it is desired should be available to the payee: *Booth* v. *Booth* (24).

This is now familiar law, but the words used must point to a gross sum. In *South American Stores* (*Gath & Chaves*) *Ld.* v. *Inland Revenue Commissioners* (25) the appellant company issued debentures, the prospectus stating that the interest would be 5½ per cent. free of English income tax. Rowlatt, J., held that this could not be read as a covenant to pay such a sum as will leave the net sum at the disposal of the recipient. In *Blount* v. *Blount* (26) the covenant was to pay 62*l.* 10*s.* 0*d.* free of income tax. Scrutton, J., was unable to construe this as a covenant to pay a sum which after deduction of tax left 62*l.* 10*s.* 0*d.* and held that it was void under s. 103 of the Income Tax Act, 1842, the predecessor of r. 23 (2.). In *Whiteside* v. *Whiteside* (27) Evershed, M.R., stated as beyond doubt that a promise to pay a sum of money free of income tax contravened the provisions of the income tax law. He clearly had not in mind contracts of service.

In the light of these and other decisions we approach the construction of the words used. The words are: " My remuneration will amount . . . to 20*l.*" (now 36*l.*) " net per month, . . . without any deductions and taxes, which will be borne by the Association ". The grammar is not perhaps quite clear. Is " without " to be understood before taxes, etc., or is it to be read as providing for " 20*l.* and taxes "? However this may be, the words which in our opinion point to a gross sum are the later words " which will be borne by the Association ". We think one is entitled to have regard to the fact that this is not an instrument drawn by lawyers. We think it means—taking the 20*l.* in the original agreement—" My remuneration is to be 20*l.*, plus whatever sum is necessary to leave that available to me, after

---

(24) [1922] 1 K. B. 66.

(25) (1926) 12 Tax Cas. 905.

(26) [1916] 1 K. B. 230.

(27) [1950] Ch. 65, 70.

"you have borne the taxes". As, under the law, the tax is suffered by deduction it means such a sum as will after deduction leave 20*l.*

At one time we thought that it was being suggested by Mr. Berkeley that the agreement meant such sum as after deduction at the standard rate left 20*l.* We did not in the end understand him so to contend. This might have involved incorporating the principle of *In re Pettit* (28), which we would have been loath to do. An employer would be very unlikely to contract on the basis that his employees would have to repay to him sums which they had recovered from the Revenue, because they were not liable to pay the standard rate on the whole or perhaps any part of their emoluments. The taxes are in our opinion the taxes referable to the plaintiff. An example of how this can be worked out is given in Simon's Income Tax, Vol. 3, at pp. 39 and 40.

We have found it unnecessary to decide the question whether r. 23 (2.) applies to salaries or remuneration for employment under Sch. E. As, however, the point was argued before us and the judge proceeded on the basis that it did apply, we will make some observations on it. That its predecessor applied to Sch. E is expressly provided by s. 103 of the Income Tax Act, 1842, and the Income Tax Act, 1918, was a consolidation Act. The words of s. 103 are: "If any person shall refuse to allow "any deduction authorized to be made by this Act out of any "rent or other annual payment mentioned in r. 9 and r. 10 of "Sch. IVA or out of any annuity or annual payment mentioned "in Sch. C or Sch. E, or in the next preceding clause, save "such annual interest as aforesaid, every such person shall "forfeit the sum of fifty pounds; and all contracts, covenants, "and agreements made or entered into, or to be made or entered "into, for payment of any interest, rent, or other annual payment aforesaid, in full, without allowing such deduction as "aforesaid, shall be utterly void".

Schedule E covers annuities and pensions as well as stipends and profits of public office. The former are annual payments, but the latter may not be. In 1922, other offices, employments and pensions previously assessable under Sch. D were transferred to Sch. E. So far as the latter are concerned it has never, so far as we know, been suggested in any reported case

(28) [1922] 2 Ch. 765.

that they were annual payments within the rules applicable to Sch. D. It would be at any rate an unexpected result if they became annual payments by the transfer. Assuming that they do, for r. 23 (2.) to be applicable it would have to be shown that the deduction was authorized. If we are right in thinking that there is no room for r. 23 (2.) where the deduction is mandatory, the only permissive deduction under Sch. E, as the matter stood before the P.A.Y.E. scheme was in respect of railway companies. Under r. 7 of Sch. E the railway company were assessed in respect of their employees, and it was provided that they may deduct the tax from the emoluments. This was the provision which came before the House of Lords in *North British Railway Co.* v. *Scott* (29). It was not necessary for the decision to decide whether r. 23 (2.) applied. The facts that there was a reference to the company's contractual liability not to deduct and that no one suggested that such a contractual liability was void under r. 23 (2.) supports the view that profits of employment under Sch. E are not annual payments within the rule. Reliance was placed on references in s. 26, sub-s. 1, of the Finance Act, 1941, and reg. 24 of the Income Tax Employments Regulations, 1944. For reasons which it is unnecessary to elaborate we doubt if much assistance can be got from either. They are certainly not purporting to render valid anything previously invalid. Their wording, though it would not conclude the issue, if it ever arises, is, we think, more consistent with the view that r. 23 (2.) has no application in this area, than the other view.

The judge came, as we have said, to a different conclusion on the construction of this agreement. He prefaced his consideration by saying that the agreement could not be construed as an agreement for a gross sum, unless this was done in quite plain terms. We are not sure that one should need plainer words for one construction rather than the other. We would have thought that it was the other way. The parties clearly intended the plaintiff to get more than 20*l.* subject by deduction or otherwise to the full tax. One must not, of course, rewrite the contract, but if two constructions are possible we would favour one which gives effect to the intention of the parties. The judge went on to hold that r. 23 (2.) was applicable. We have given our reasons for thinking this does not arise, but, as the judge decided that it

(29) [1923] A. C. 37.

C. A.
1950

JAWORSKI
v.
INSTITUTION
OF POLISH
ENGINEERS
IN GREAT
BRITAIN LD.

was applicable, we thought it right to express our doubts on this point.

For these reasons we think that this appeal succeeds.

Appeal allowed.

Solicitors: *H. H. Wells & Sons; Gaunt, Foster & Hill.*

C. G. M.

1950
Dec. 7.

Lord Goddard, C.J., Hilbery and Parker, JJ.

REX *v.* SIDMOUTH RENT TRIBUNAL.
Ex parte SELLEK.

Landlord and tenant—Rent restriction—Reasonable rent of flat determined by rent tribunal—Jurisdiction—Rateable value of flat on appropriate day—House converted into flats—No apportionment of rateable value made—Flat separately assessed at rateable value exceeding statutory limit—Rateable value of whole house below statutory limit—Power of county court judge to apportion rateable value of house converted into flats—Whether new entity created —Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 3*—Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 7, *sub-ss.* 2 *and* 3*—Landlord and Tenant (Rent Control) Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 1, *sub-s.* 1.

By the Rent and Mortgage Interest Restrictions Act, 1939, s. 3, sub-s. 1, the Rent and Mortgage (Restrictions) Acts, 1920 to 1939, shall in general apply to every dwelling-house "of which "the rateable value on the appropriate day did not exceed" in the country "75*l*.".

By s. 7, sub-s. 1, "the appropriate day" is defined for that purpose as April 1, 1939. By sub-s. 2: "In relation to any dwelling-house of which the rateable value on the appropriate day "was not on that day separately assessed, any reference in the "preceding provisions of this Act to the rateable value on the "appropriate day shall be construed as a reference to such proportion of the rateable value on that day of the property in "which the dwelling-house is comprised as may be apportioned to "the dwelling-house by the county court in accordance with s. 12, "sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920". By sub-s. 3: "In relation to any dwelling-house first assessed after the appropriate day, any reference in "the preceding provisions of this Act to the rateable value on the "appropriate day shall be construed as a reference to the rateable "value on the day on which the dwelling-house was first assessed".

A house in the country, which on April 1, 1939, had a rateable value of 70*l*. a year, was in 1947 converted into flats. No order by a county court judge for the apportionment of the rateable

1950

REX
v.
SIDMOUTH
RENT
TRIBUNAL.
Ex parte
SELLEK.

value of the house was ever applied for or made. On March 27, 1948, one of those flats was separately assessed (for the first time) at a rateable value of 80*l.* a year. The tenant of that flat applied to a rent tribunal under s. 1, sub-s. 1, of the Landlord and Tenant (Rent Control) Act, 1949, to determine a reasonable rent for it, which the tribunal did. On an application for an order of certiorari to quash that determination:—

Held, that the tribunal had no jurisdiction to make that determination because s. 7, sub-s. 3, of the Act of 1939 applied to the flat and that it was not therefore subject to the Rent Restriction Acts notwithstanding sub-s. 2 of s. 7 because, even assuming (as to which *quære* per Lord Goddard, C.J.) that although, if the tenant had applied to a county court judge to apportion the rateable value on April 1, 1939, of the whole house, namely 70*l.* a year, he must have apportioned a smaller rateable value to the flat, a tenant could rely on sub-s. 2 only where such an apportionment had in fact been made.

APPLICATION for an order of certiorari.

Aldenham House, Sidmouth, a house formerly used as a boarding house, of a rateable value of 70*l.* a year, was in 1947 converted into four self-contained flats. In 1948 the owner of the house (who had bought the freehold from the previous owner in July, 1947) let one of those flats to a tenant as from March 25 for a term of three years at a rent of 200*l.* a year exclusive of rates. On March 27, 1948, that flat was separately rated (for the first time) at 80*l.* a year.

The tenant in 1950 applied to Sidmouth Rent Tribunal to determine a reasonable rent for that flat under s. 1, sub-s. 1, of the Landlord and Tenant (Rent Control) Act, 1949. The tenant stated in his application that the rateable value of the flat on the appropriate day was 64*l.* a year and the landlord did not contest that statement. The tribunal determined a reasonable rent for the flat to be 100*l.* a year.

The landlord now applied for an order of certiorari for the quashing of that decision on the ground that the flat was not a dwelling-house with a standard rent to which the Rent Restriction Acts applied, and that the tribunal had therefore no jurisdiction to make that determination.

Norman King for the landlord. The rent tribunal had no jurisdiction to determine a reasonable rent for the flat under the Landlord and Tenant (Rent Control) Act, 1949, s. 1, sub-s. 1, because the flat was not in fact subject to the Rent Restriction Acts. The flat was in fact first rated at 80*l.* a year, and that was the figure which by s. 7, sub-s. 3, of the Rent and Mortgage Interest Restrictions Act, 1939, had to be taken in determining whether or not the flat was within the 75*l.* limit of rateable value imposed by s. 3, sub-s. 1, of that Act. That the rateable value of the flat was subsequently reduced was immaterial. [Counsel referred to *Eyre* v. *Haynes* (1).]

J. P. Ashworth for the tribunal. It is conceded that the reduction of the rateable value of the flat to 64*l.* a year was immaterial, but the flat nevertheless falls within the Rent Restriction Acts by sub-s. 2 of s. 7 of the Act of 1939. If the tenant had applied to the county court judge under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 3 (2), the judge must have apportioned the rateable value on the appropriate day (April 1, 1939) of the whole house, namely 70*l.*, and that of the flat must necessarily have been less than 70*l.* Where a house is divided into flats the rateable value of a flat for the present purpose must be arrived at by apportionment: see *Lindop* v. *Quaife* (3). In such a case sub-s. 3 of s. 7 has no application. The Act of 1920 applied only to existing premises. Sub-section 3 of s. 7 was inserted in the Act of 1939 only with the object of covering houses built after the appropriate day. [Counsel referred to *Barrett* v. *Hardy Bros. (Alnwick) Ld.* (4) and *Langford Property Co. Ld.* v. *Goldrich* (5).]

[Lord Goddard, C.J. referred to *Langford Property Co. Ld.* v. *Batten* (6).]

King in reply.

Lord Goddard, C.J. [after reviewing the facts]:—If the flat now in question was rated at the appropriate date for the purposes of the Rent and Mortgage Interest Restrictions Act, 1939, at over 70*l.* a year it was not subject to the Rent Restriction Acts and, therefore, was not a flat of which the rent tribunal had jurisdiction to determine a reasonable rent by the Landlord and Tenant (Rent Control) Act, 1949, s. 1, sub-s. 1. The tenant stated in his application to the tribunal that the rateable value of the flat on the appropriate day was 64*l.* a year; and that figure was not challenged by the landlord at the hearing. Had that been so, the flat would have been subject to the Rent Restriction Acts, and the tribunal would therefore have had jurisdiction in the matter by s. 1, sub-s. 1, of the Act of 1949.

We have to consider the effect of s. 7 of the Act of 1939, which was passed owing to the outbreak of war, and which brought into control the rents of so many premises which previously had been free of control. [His Lordship read sub-ss. 2 and 3 of that section, and continued.] Sub-section 3 applies to " any dwelling-house first assessed after the appropriate day ", that day being, by sub-s. 1, April 1, 1939. The flat now in question certainly falls within those words. It was first assessed on March 27, 1948, at a rateable value of 80*l*. a year. That, therefore, appears to be the figure which, by sub-s. 3, must be taken for the purpose of determining whether it falls within the Rent Restriction Acts. It is true that at a later date its rateable value was reduced to 64*l*. a year, but that is now agreed to be immaterial.

---

(1) (1945) 62 T. L. R. 63.

(2) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 3: "Where, for the "purpose of determining . . . the "rateable value of any dwelling-house ". . . it is necessary to apportion ". . . the rateable value of the "property in which the dwelling-"house is comprised, the county court "may, on application by either party, "make such apportionment as seems "just . . . ".

(3) [1949] W. N. 77.

(4) [1925] 2 K. B. 220.

(5) [1949] 1 K. B. 511.

(6) [1951] A. C. 223.

But counsel for the tribunal argued that sub-s. 3 of s. 7 was inapplicable, and that sub-s. 2 applied in the present case. He contended that, as the flat was part only of the house, and as the house in which it was comprised was assessed on the appropriate day at a rateable value of 70*l*. a year, the rateable value of the flat had by sub-s. 2 to be taken for the present purpose as a proportion of that figure, and, therefore, that it must fall within the Rent Restriction Acts.

The first answer to that argument is that, where a tribunal has a property referred to it, it must be established what was the rateable value of that property at some time, and if there has been only one assessment of that property that must be, prima facie, the relevant assessment. If it is to be said that the property is part of a house that has originally been rated as a whole, and that that assessment is the one to be considered, it seems to me that the first thing to be established is that that assessment has been apportioned by a county court judge.

To my mind it is not enough to say that if the matter had been referred to a county court judge he must have assessed the rateable value of the property at less than 70*l*. The answer is: that, if it is desired in a case such as the present to rely on an assessment of the house as a whole, it is necessary first to go to the county court judge and get him to apportion it. The words of sub-s. 2: " a reference to such proportion of the rateable " value on that day "—that is April 1, 1939—" as may be " apportioned to the dwelling-house by the county court " are, I think, conclusive on that. The county court must make the apportionment. The word " may " there is not used in contradistinction to " must ". It is used because the sub-section is applying to the present, and to the future. The county court may be asked to make the apportionment at any time. It may be asked to make it at the present time or at a future time. A tenant on applying to the tribunal under the Landlord and Tenant (Rent Control) Act, 1949, s. 1, sub-s. 1, to exercise their jurisdiction of reducing the rent which he has agreed to pay must first show that he has put his tackle in order, if I may use that expression, and that he has done all that is required to be done in order to give the tribunal jurisdiction. He must show that they have jurisdiction. The tenant in the present case has never been to the county court; there has been no apportionment of the rateable value of the whole house. The whole house has not been referred to the tribunal; the only premises that have been referred to the tribunal are the new flat.

I think that the main point of counsel for the tribunal was that, as the rateable value of the whole house on April 1, 1939, was only 70*l*., it follows that the county court judge must have apportioned that sum and therefore found the rateable value of the flat to be less than 70*l*. a year. In my opinion that is an extremely doubtful proposition—though I do not think it necessary for us to decide it positively—in view of the recent decision of the House of Lords in *Langford Property Co., Ld.* v. *Batten* (7). I think it probable that, if the question comes up directly for decision, it will be held that on an application for apportionment under s. 12, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the county court judge can consider whether the effect of the conversion of a house into flats is not to create an entirely new entity. Such conversion may not be a mere matter of structural alteration or improvement: it may be in some cases that the county court judge would find that an entirely new entity had been created. and such a new entity could, I think, be created notwithstanding that the original four walls of the house remained. The interior of an old fashioned house with perhaps three or four storeys could be completely taken out as if it had been gutted by fire, and the whole place could be not only reconstructed but rebuilt inside, so that what remained after the alteration was not a converted house but a block of four flats which were entirely self-contained. I do not think that we can speculate as to what the county court judge might have done or found, still less what he would have been bound to find, if the rateable value of the house in the present case had gone to him for apportionment.

I prefer, however, to base my decision entirely on the fact that, as there had been no apportionment here, the only rateable value which could have been put before the tribunal was the rateable value which was in fact first put on this flat, namely, 80*l*. a year.

For these reasons certiorari must issue.

HILBERY, J. I entirely agree. It appears to me that the tenant presented his application to the rent tribunal in relation to the dwelling-house which he was occupying, namely, a self-contained flat. The rateable value of that flat on the appropriate date, which the tribunal had to consider, was 80*l.* a year. The tenant, in stating in his application what was the rateable value, stated that value at the time of making the application. That was a mistake: he should have specified the rateable value at which the flat was first separately assessed. There was no other rateable value which he could properly state at that time. The argument of counsel for the tribunal is, in effect, that the tribunal had jurisdiction to make an apportionment of the rateable value of the whole house, an apportionment which only a county court judge has power to make, in order to ascertain a rateable value for the flat which would give them jurisdiction to determine its rent. That seems to me to be an impossible contention. The county court is the tribunal which alone can make an apportionment for the purpose of s. 7, sub-s. 2, of the Act of 1939, and in doing so it will have to consider, among other matters, as my Lord has pointed out, whether in the particular circumstances of the case the entity of which it is asked to apportion the rateable value is the same entity as the original house, as is contemplated by s. 7, sub-s. 2.

---

(7) [1951] A. C. 223.

I agree that certiorari should issue.

PARKER, J. I agree, and would only add that for my part I would decide this case on the strict construction of sub-s. 2 of s. 7 of the Act of 1939. The question is: what do the words "may be apportioned" mean? Do they mean that it is a condition precedent that the rateable value shall be apportioned by the county court judge? It seems to me that one can test the question by considering the position had the original house, while it was a boarding house, had a rateable value of, say, 150*l.* a year: it would then have been necessary, and, indeed, this is conceded, that there should have been an apportionment of its rateable value by the county court before s. 7, sub-s. 2, could have applied; in other words, in that case the words "as "may be apportioned" must read "as shall be apportioned" by the county court. It seems to me that if that is the true construction of those words in such a case it must equally apply in the present case where the rateable value of the house is only 70*l.* a year.

For those reasons I agree that certiorari should issue.

Application granted.

Solicitors: *Vivash Robinson & Co. for Michelmore, Davies & Bellamy, Sidmouth; Solicitor, Ministry of Health.*

R. P. C.

C. A.

1950
Dec. 13, 14, 15.
1951
Feb. 7.

Evershed, M.R., Singleton and Birkett, L.JJ.

SELLERS *v.* LONDON COUNTIES NEWSPAPERS.

[Plaint No. F.1176.]

Contract — Master and servant — Wrongful dismissal — Measure of damages — Commercial Traveller — Remuneration by salary and commission—Whether entitled to commission on orders executed after termination of employment.

By an oral agreement of 1947 the defendants agreed to employ the plaintiff as a commercial traveller or advertising representative at a salary of 3*l*. a week and on the terms that on all advertisements which he obtained for the defendants, and which they accepted, he was to be paid a commission when the advertisements appeared in one of their newspapers. The advertisements on which commission was payable were either advertisements which the plaintiff had obtained or advertisements received from his customers which he had been instrumental in obtaining. Orders for advertising space were divisible into three groups: orders for a single advertisement; orders for a series of advertisements continuing for a definite period or until cancelled; and repeat orders, being further orders placed without any further solicitation on his part by customers originally introduced by the plaintiff. The defendants on April 28, 1950, gave to the plaintiff one week's notice terminating his employment on May 4. He brought an action for damages for wrongful dismissal, alleging that he was entitled to three months' notice. The county court judge held that he was entitled to one month's notice expiring on May 28, and awarded him damages estimated on the basis that he was entitled, in addition to his salary, (a) to commission in respect of advertisements attributable to his canvassing and inserted in any of the defendants' newspapers between May 4 and May 28, and (b) to damages for having been deprived of the opportunity of earning further commission between May 4 and May 28. The plaintiff appealed, contending that he was entitled to an account in respect of advertisements obtained by him or through his introduction during his employment and published by the defendants after its termination. He made no claim in respect of repeat orders.

Held, by Singleton and Birkett, L.JJ.; Evershed, M.R., dissenting, that, when the plaintiff had obtained an order for an advertisement, he had done all that was required of him to earn his commission, that, if the defendants accepted and published the advertisement, the plaintiff was entitled to commission, and the defendants could not, by terminating his employment, deprive him of the commission he had thus earned; and that he was entitled to commission on the same principle in respect of an order for an advertisement to continue until cancelled, in which case the plaintiff was entitled to his commission whenever the advertisement was published.

Bilbee v. *Hasse & Co.* (1889) 5 T. L. R. 677, and *Levy* v. *Goldhill* [1917] 2 Ch. 297 considered.

Marshall v. *Glanvill* [1917] 2 K. B. 87, and *Crocker Horlock, Ld.* v. *B. Lang & Co., Ld.* [1949] 1 All E. R. 526 distinguished.

APPEAL from Judge Leon sitting at Clerkenwell county court.

By an oral agreement of October, 1947, the defendants, London Counties Newspapers, a firm, agreed to employ the plaintiff, as they alleged, as an advertising representative, or, as he alleged, as a commercial traveller. The county court judge made no finding on the terms of the employment. It appeared from the particulars of claim and the defence that the plaintiff was employed to sell advertising space in the defendants' newspapers on the terms that he should be paid a salary of 3*l*. a week and a commission of 7½ per cent. on all sales of such space effected by him. The parties agreed that the commission was only payable if and when the relevant advertisements had actually appeared in one of the defendants' newspapers. The orders which the plaintiff obtained might be for a single advertisement, or for a series of advertisements appearing either for a definite period or until publication was stopped, referred to as "running contracts". There might also be repeat orders, that is, orders sent in by one of his customers without further solicitation by him. The plaintiff was entitled to commission on advertisements obtained by him and on advertisements obtained from his customers. The terms of the agreement are considered in detail in the judgment of Evershed, M.R.

On April 28, 1950, the defendants gave the plaintiff one week's notice terminating his employment on May 4. In this action he claimed damages for wrongful dismissal, alleging that he was entitled to three calendar months' notice to terminate his engagement. The county court judge held that the plaintiff was entitled to one calendar month's notice expiring on May 28, and accordingly that he had been wrongfully dismissed. He awarded him 10*l*. 10*s*. 0*d*. damages. This figure was made up (after allowing for payments made to the plaintiff by the defendants) of three elements: (a) loss of salary up to May 28; (b) commission accruing to the plaintiff during May on orders which he had previously obtained and which had been printed; and (c) the commission which he might have earned up to May 28 if he had not been wrongfully dismissed. The plaintiff appealed, claiming that he was also entitled to commission on any orders for advertisements which he had obtained for the defendants while employed by them which were in fact published by them after May 28. He made no claim to commission on repeat orders.

Sir Godfrey Russell Vick, K.C., and *H. H. Harris* for the plaintiff. It is submitted that the county court judge misdirected himself and that the plaintiff is entitled to an account of the commission due to him in respect of advertisements procured by him for the defendants and published by them after he had left their employment. The judge only awarded damages based on the average commission he would have earned during the month of May if he had not been wrongfully dismissed. There is no reported case in which a plaintiff has been deprived of the profits of his work as the result of his wrongful dismissal. The true measure of damages is what he would have earned if he had not been wrongfully dismissed. Nor is there any reported case in which a commercial traveller has been refused an account of orders obtained before he was dismissed.

[They referred to *Marshall* v. *Glanvill* (1), *Gerahty* v. *Baines & Co. Ld.* (2), *Bilbee* v. *Hasse & Co.* (3), and *Crocker Horlock Ld.* v. *B. Lang & Co. Ld.* (4).]

Having been employed to secure advertisements, the plaintiff is entitled to any commission arising in respect of advertisements which, though published after the date of his dismissal, resulted from his previous efforts. He is entitled to the fruits of his work. It must be remembered that he was wrongfully dismissed.

Casswell, K.C., and *John May* for the defendants. The plaintiff was only entitled to commission up to the date when he was dismissed. Both the salary and commission to which he was entitled came to an end at the termination of the period of service. There could be no claim for future commission when once the employment had been terminated. Thus in *Nayler* v. *Yearsley* (5) it was held that there was no commission payable for work done of which the benefit arose after the period of service had ended. [They referred also to *Cramb* v. *Goodwin* (6).] Under this contract the plaintiff is not entitled to any remuneration after his employment terminated. He has not claimed commission in respect of repeat orders, and such orders are in fact no different from "running contracts".

[They referred to *Boyd* v. *Mathers and "South Africa"* (*Ld.*) (7), *Bettany* v. *Eastern Morning and Hull News Co. Ld.* (8), *Wilson* v. *Harper* (9), *Gerahty* v. *Baines & Co. Ld.* (10), *Morris* v. *Hunt & Co.* (11), and *Crocker Horlock Ld.* v. *B. Lang & Co. Ld.* (12).]

It is impossible to suppose that the defendants would have agreed to pay commission to the plaintiff after the termination of his employment. The general rule is that an employee's remuneration ceases with his employment: see Halsbury's Laws

---

(1) [1917] 2 K. B. 87.
(2) (1903) 19 T. L. R. 554.
(3) (1889) 5 T. L. R. 677.
(4) [1949] 1 All E. R. 526.
(5) (1860) 2 F. & F. 41.
(6) (1919) 35 T. L. R. 477.
(7) (1893) 9 T. L. R. 443.
(8) (1900) 16 T. L. R. 401.
(9) [1908] 2 Ch. 370.
(10) (1903) 19 T. L. R. 554.
(11) (1896) 12 T. L. R. 187.
(12) [1949] 1 All E. R. 526.

C. A.
1951

SELLERS
v.
LONDON
COUNTIES
NEWSPAPERS.

of England (2nd ed.), Vol. 1, p. 260. The position is different where a man is employed on commission to do a particular piece of work, when, if he does the work, he is entitled to his commission even if his contract is terminated. *Bilbee* v. *Hasse & Co.* (13) is distinguishable from this case.

Sir Godfrey Russell Vick, K.C., in reply. Under this agreement the commission is not payable until the advertisements are published. It would be inequitable to deprive the plaintiff of commission which he has earned before but payable after his employment has terminated. It would be odd if an agent were entitled to commission in respect of an individual transaction but not in respect of a series of transactions. The difference between repeat orders and running orders is that, in the case of the latter, one order only is obtained, and that as the result of the agent's efforts.

Cur. adv. vult.

February 7. The following judgments were read:—

EVERSHED, M.R. This appeal has raised a difficult question as to the rights and remedies of the plaintiff against his former employers, the defendants.

I have upon it had the misfortune to arrive at a different conclusion from that of my brothers, whose judgments I have had the advantage of reading. I feel it, therefore, my duty to state the reasons fully for my opinion, which is in favour of dismissing this appeal.

[His Lordship stated the facts and continued:] Before considering the question of the remedies to which the plaintiff is entitled, it is necessary to see what were his rights and accordingly to determine what were the terms of the contract between the plaintiff and the defendants. It is at this point that the first difficulty arises. Although the agreement between the plaintiff and the defendants was oral, there is no finding by the county court judge of the terms of the contract. It has been said on the part both of the plaintiff and of the defendants that there was, in fact, no dispute on this point: and it is no doubt for that reason that the judge in his judgment does not state any view of his own on what were the terms of the bargain. Since the point mainly debated on the appeal is whether the plaintiff is entitled to commission in respect of advertisements inserted after May 28 attributable to orders obtained by the plaintiff during the term of his service—a point not only of importance to the plaintiff but also (as we were informed) to other persons employed on similar terms—and since, as has been pointed out on many occasions in

(13) 5 T. L. R. 677.

the cases cited to us, the question depends first and last upon the particular terms of the particular contract, it must be confessed that it is singularly unfortunate that there is no statement on the part of the judge of the terms of the contract in question in this action. I must not be taken, in saying this, to be criticizing the judge; for, as I have said, it appears that the case was fought on the basis of there being no real dispute on this matter. Indeed, I venture myself somewhat to doubt whether the point, as it has been developed in this court, was ever fairly and squarely put at the trial in the county court. In any case, it is to be noted that the onus of proof is on the plaintiff.

Before proceeding to see what, on the material before us, is the proper inference to be drawn upon the question of the terms of the contract, it may be convenient to note that there is, as I understand it, more than one kind of advertisement with which this case is, or may be, concerned. There is the simple case of an order obtained for a single advertisement, or a limited and specified number of advertisements. In the case of single advertisements, the evidence of the plaintiff was that the advertisement itself commonly, if not usually, appeared within one week after the obtaining of the order. There is also the case of an order obtained for a continuing and indefinite series of advertisements appearing at regular weekly or other intervals and going on until stopped by one party or the other. This kind has been referred to as " until cancelled " or " running " contracts. Finally, there is the case of advertisements placed by advertisers originally introduced by the plaintiff but without any further solicitation on his part. These have been called " repeat orders ".

By his particulars of claim the plaintiff alleged that he was employed by the defendants as a commercial traveller " on the " terms that he should . . . obtain orders for the sale of adver-" tising space in the defendants' newspapers and that he should " be paid by the defendants a weekly salary of three pounds and " a commission of 7½ per cent. on all sales for such space effected " by him, or received direct from his customers ". There was also an allegation in regard to expenses allowance, but nothing turns on that particular matter.

By their defence the defendants said that the plaintiff was engaged, not as a commercial traveller, but as an advertisement representative. They also said that the commission to which the plaintiff was entitled was only payable to him " if and when " the relevant advertisements had actually appeared in the " defendants' newspapers ".

Apart from these qualifications, the allegation quoted from the particulars of claim was admitted. Both the plaintiff and the defendants' manager gave evidence at the trial on the terms of the contract. The judge has not made any note of the manager's evidence, but his note of the evidence of the plaintiff on this matter is, so far as material, as follows. After saying that he was a commercial traveller the plaintiff is recorded as stating: "At the interview with [the manager] it was agreed "that I was to receive 3*l.* per week plus a commission of 7½ per "cent. on all display space advertisements and 12½ per cent. on "all small classified advertisements either obtained by me or on "those which I was instrumental in obtaining for the firm. "Commission was to be payable on the advertisements appearing "in the newspapers, irrespective of payment by the customer, "and it was to be payable monthly".

Apart, therefore, from the question of the proper description of the plaintiff (either commercial traveller on the one hand or advertisement representative on the other) which to my mind is, for reasons given hereafter, immaterial, there is, I think, no dispute of substance between the two parties on the nature of the contract, though I find it difficult to assert with any confidence what were its precise terms. As will be noticed, there appears to be a divergence upon the actual rates of commission, but this has been resolved, and no point is made upon it in this court. But it seems to me clear that the second qualification suggested by the defendants in their defence to the pleaded allegation of the plaintiff was conceded, i.e., that the plaintiff only became entitled to receive commission when the relevant advertisements actually appeared in the defendants' papers. From this it seems to follow that the defendants were in a position to refuse to accept any advertisement from an advertiser introduced by the plaintiff, and thereby to avoid any liability to him for commission in respect of such advertisements, though he had done the work of procuring them. This indeed has been conceded by Sir Godfrey Vick on the plaintiff's behalf. It seems to me also clear that the terms of the bargain contemplated two types of advertisement in respect of which commission would be payable to the plaintiff: the first is described in the particulars of claim as "sales effected by him" and in the plaintiff's evidence as "advertisements obtained by" him. The second type is described in the particulars of claim as "sales received direct "from his customers" and in the plaintiff's evidence as "advertisements which I was instrumental in obtaining for the firm".

In my judgment, although there is a marked difference in the language, the two types of advertisement correspond to the two distinct kinds of order upon which, in the various decided cases, commission was contracted to be payable to the agents in those cases. The first type may be stated as being advertisements procured directly by the plaintiff, that is, advertisements directly attributable to orders which he got; and this type would, I think, inevitably cover both the ordinary and simple kind of case above described and the " until cancelled " or " running " contracts. All advertisements of both these kinds seem to me necessarily to fall within the first branch of the subject matter on which commission was payable, whether according to the language of the particulars of claim or according to the plaintiff's language in the witness box: for both can in the ordinary sense of language be said to be " obtained " or " effected " by the plaintiff.

In these circumstances, there must be some distinct kind of advertisement properly and fairly described as " placed direct " by the advertisers ", or which (by contrast) the plaintiff was " instrumental in obtaining ". I therefore think that the second head of advertisements in respect of which the defendants promised to pay commission (whether according to the language of the particulars of claim or to the language of the plaintiff's evidence) must refer to advertisements not attributable directly to orders obtained by the plaintiff. In other words, it seems to me that the second head of advertisements in respect of which commission was promised must refer to what have been called " repeat orders ", that is, to the third category of advertisement tabulated above. Upon this matter I regret to find that my view differs from that of my brethren: and the difference emphasizes the unfortunate significance of the absence of any finding of fact by the county court judge, particularly since this conclusion, if correct, seems to me to be of great importance in determining the true nature of the plaintiff's rights.

I add, however, that if (as my brethren think) the contract does not comprehend " repeat orders ", I still arrive, for reasons later appearing, at a conclusion adverse to the plaintiff.

In my judgment, the first point to observe on the character of the agreement as alleged and proved is that in this case the plaintiff was the servant, indeed, as I follow it, the whole-time servant of the defendants. Whether he is properly called a commercial traveller or an advertising representative, his position is, I think, essentially different from that of an independent contractor, like a broker or house agent, who is engaged by a principal on commission terms to transact some single piece of business, or a specified and limited number of pieces of business. In the latter class of case, if the agent is promised a commission provided that he produces for his principal, e.g., a person ready and willing to buy his house, then, if he does the work for which commission was promised, he becomes entitled to that commission, although his principal afterwards purports to put an end to the agency.

The case of an employee seems to me, however, fundamentally different. In such a case, prima facie, I should have thought, the remuneration which the employer promises to pay as consideration for the services to be rendered is payable only during such time as the services are rendered in fact. If the remuneration is by way of fixed salary, this would, I imagine, be conceded as clear; but I venture to think that the principle is the same whether the remuneration is wholly by salary or partly by salary and partly by commission (as in this case) and whether the commission is calculated by reference, say, to profits made by the employer, or in any other way.

It was suggested in the present case, on the true construction of the bargain made, that the commission became payable in each case on the orders being given, though the time of payment might be postponed until the actual advertisement appeared. I cannot accept this argument. As I have already indicated, the qualification suggested in the defence was clearly borne out by the plaintiff himself in his evidence. It was, I think, clear that the right to commission did not depend on whether the advertiser in fact paid the defendant firm; on the other hand, it did depend on the defendant firm's accepting the advertisement and inserting it in one or other of their newspapers. Thus, I do not myself think that the plaintiff could have made firm contracts on behalf of the defendants with potential advertisers; and, in any case, as I have already stated, it was conceded, on the plaintiff's behalf, that nothing became due until the defendants accepted the advertiser's offer by, in fact, inserting their advertisement. Thus (and this point has been relied on by the plaintiff) the defendants could always avoid liability to the plaintiff by refusing to accept the advertiser's advertisement. And this view is strongly reinforced if commission was payable on two classes of advertisement (according to my view), namely, advertisements directly attributable to orders obtained by the plaintiff and also orders coming from old customers originally introduced by the plaintiff but without any particular solicitation. For in the latter class of case, it would be impossible to say that commission became payable on the orders being obtained by the plaintiff: ex concessis the particular advertisement was not the result of a particular order so obtained.

I have already stated that, for the purposes of this appeal, the plaintiff has expressly said through his counsel that he makes no claim in respect of "repeat orders". But this concession does not, in my judgment, extricate the plaintiff from the difficulties imposed on him by the terms of the contract, if I have correctly found them. If, in truth, by the terms of his contract the plaintiff was entitled to commission in respect of "repeat orders", as well as in respect of orders of the first two kinds which I have stated, then it seems to me logically impossible to distinguish between "repeat orders" on the one hand and other types of advertisement on the other; to commission in respect of both of which he is by the terms of the bargain equally entitled. I do not, on that view, see how he could be disentitled to commission after he had ceased to be employed in respect of one type of advertisement and yet remain entitled to commission after termination of his employment in respect of the other type.

In any case, if he is entitled to commission at all in respect of advertisements appearing after he had ceased to be employed, then the plaintiff must allege that, for the purpose of giving him a right to such commission, the agreement still to that extent remains in force notwithstanding that his service has come to an end.

It is said, and said with some force, that it is just and fair to the plaintiff that, if he has done all the work required, then he should be entitled to the fruit or reward for his labours. But the question is, has the contract so provided? And the argument is as valid in the case of "repeat orders" as in the case of other types of order. In the case of "repeat orders" the advantage gained by the defendants would, on analysis, be attributable to the original introduction by the plaintiff. Still treating the matter as one of principle, there is a further point to be noted. Even if "repeat orders" are out of the way, the plaintiff nevertheless asserts his right to commission on the "running" contract or "until cancelled" type of advertisement. Now, it is at least possible that such orders might continue to run for a very considerable time after the plaintiff had ceased to be employed by the defendants. Yet, if the plaintiff is right, he would be entitled long after he had ceased to be employed by the defendants to ask for an account of these "running" contracts and to claim on an account that commission was due from time to time in respect of them. Such a result may no doubt be the consequence of an agreement in appropriate terms. But, in my judgment, it is a result which is, on the whole, unlikely in the case of a contract between employer and employee, and is a result clearly not justified to my mind by any requirements of business efficacy.

If, therefore, I have come to a right conclusion of the terms and effect of the contract as a matter of construction, it seems to me contrary to principle and good sense that the commission, unlike a fixed salary, should continue to be payable to the plaintiff after the end of his service with the defendants. It remains, however, to see whether, as a result of the numerous authorities which have been quoted to us, any different conclusion emerges.

As observed by Peterson, J., in *Levy* v. *Goldhill* (14), it is one of the characteristics of the cases on this subject matter that they are for the most part most scantily reported. It seems also that there is no case in the books in which this precise point, or

(14) [1917] 2 Ch. 297.

rather the point which emerges from the terms of this contract as I have construed it, has been the subject of a clear and direct decision. So far as can be gathered from the reports, the real issue was always, or almost always, in regard to repeat orders. For these reasons I do not propose to consider more than a few of the many cases to which we have been referred.

The earliest case cited was that of *Nayler* v. *Yearsley* (15). The plaintiff in that case alleged that he had been employed by the defendant as an advertising canvasser on terms of being paid by commission (only) on advertisements inserted in the Medical Circular "on his introduction and on all renewals". On December 28, 1858, the plaintiff had been informed by or on behalf of the defendant that he was no more wanted, that no more advertisements would be accepted from him, and "that "he was to have no renewal orders". The plaintiff's claim in the action was that he was by his contract entitled to a reasonable notice terminating his contract. The claim failed because the alleged contract was found by the jury not to have been proved. The plaintiff admitted that he had been paid all that had been due to him up to December 28, 1858. Wightman, J., refused leave to the plaintiff to amend his claim by adding a count for commission, and he non-suited the plaintiff but gave him liberty to move to enter a verdict in his favour if there should be any evidence to go to the jury.

I have referred at a little length to this case, for it is cited in later cases—particularly by Mr. Bankes, K.C., in *Gerahty* v. *Baines & Co. Ld.* (16), as the foundation for the general proposition that prima facie in a contract of service all liability to pay remuneration to the servant (whether by way of salary or commission) ceases with the end of the service. The report in *Nayler* v. *Yearsley* (17) is brief, and the case no doubt turned to a large extent on matters of pleading; but it does, in my opinion, support the general proposition above cited.

In *Boyd* v. *Mathers and "South Africa" (Ld.)* (18) the claim of the plaintiff as a former advertising canvasser was for commission in respect of advertisements inserted after the settlement of the last account between him and the first defendant and also in respect of renewal orders, and (as stated in the report) the latter subject matter was the main question in the case. But Lindley, L.J., delivering the first judgment in this court, is reported as saying that he "could not read the letters as amount-"ing to a contract that the plaintiff was to be paid a commission "on all advertisements appearing in the paper after he had "ceased to have anything to do with it. He was to be paid a

---

(15) 2 F. & F. 41.
(16) 19 T. L. R. 554.
(17) 2 F. & F. 41.
(18) 9 T. L. R. 443.

"commission in respect of his services and after he had ceased "to be in a position to render any services he was not to receive "anything".

Then in *Gerahty* v. *Baines & Co. Ld.* (19) the plaintiff had been employed on a commission basis (it does not appear whether he had been a whole-time employee) as an advertising canvasser. His service had been terminated by a six months' notice. He claimed commission in respect of renewals after termination of the contract, to which the defendants' answer was (by Mr. Bankes, K.C.) that all right to remuneration ceased with the end of the contract. The jury found in the defendants' favour, and Lord Alverstone, C.J., said: "The plaintiff was the defendants' "canvasser; and it made no difference that his services were paid "for by commission and not by salary. . . . The position of the "canvasser . . . was that, if he was going to claim commission "after the expiration of his employment, there must be a special "bargain to that effect. . . . The terms of the contract applied "to the period during which the plaintiff was canvasser".

It is true that, as appears from the report, the defendants were willing to concede the plaintiff a right to commission on "certain running advertisements". But, in my judgment, the result and the language of the Lord Chief Justice show that Mr. Bankes' argument was accepted as correct.

The same conclusion follows, in my view, from *Cramb* v. *Goodwin* (20), which came before this court, of which Bankes, L.J., was a member, and in which the distinction was observed between the case of an employee paid by salary or commission or both, on the one hand, and a commission agent who is an independent contractor, on the other.

Bilbee v. *Hasse & Co.* (21) (much relied upon by Sir Godfrey Russell Vick) was an example of the latter kind of case. But, as appears from the judgment of Peterson, J. (already mentioned), in another case of the same kind, *Levy* v. *Goldhill* (22), the case went to the Court of Appeal, which affirmed the judgment in favour of the plaintiff; and Bowen, L.J., then used the phrase which Sir Godfrey Russell Vick invited us to apply in his client's favour (23): "the measure of his [the plaintiff's] payment was to be calculated not by the work done by him, but "by the fruits of that work and those fruits might very well "accrue to the defendant after termination of the agency". But it is, in my judgment, of the essence of the decisions in *Bilbee* v. *Hasse & Co.* (21) and *Levy* v. *Goldhill* (22) that the plaintiff in each case was not in the position of a servant but that of an

(19) 19 T. L. R. 554, 555.
(20) 35 T. L. R. 477.
(21) 5 T. L. R. 677.
(22) [1917] 2 Ch. 297, 299.
(23) The Times, January 16, 1890.

independent contractor having (accordingly) no contract or term of service at all.

In my judgment, therefore, the authorities support and are consistent only with the view which I have already indicated, namely, that, in the case of a contract of service between master and servant, all right on the servant's part to remuneration by commission or otherwise will cease with the termination of his service unless by the terms of his contract provision to the contrary is clearly made. "Prima facie," said McCardie, J., in *Marshall* v. *Glanvill* (24), "the liability to pay commission in "cases of this kind ceases as to future trade with the cessation "of the employment in the absence of a reasonably clear intention to the contrary." The language quoted was, it is true, used in reference to a contract whereunder commission was payable in respect of all trade done by the employers within a specified area whether introduced by the plaintiff or not; but it was, in my view, rightly applied by the county court judge to the present case.

Before leaving the authorities, I refer finally to the recent action before Morris, J., of *Crocker Horlock Ld.* v. *B. Lang & Co. Ld.* (25), a case of master and servant, for payment to the latter of "5 per cent. on all orders whether received direct or "indirect and on all repeats", in which, again, the issue in fact related to repeat orders received after termination of the contract. In rejecting the plaintiff's claim Morris, J., put the matter—in my view rightly—thus: "the remuneration was the remuneration payable during the contract period and that the parties "have not provided by this contract for any payment after that "period comes to an end".

I think, therefore, that the county court judge rightly determined the contractual rights of the plaintiff in the present case. But there remains the question of the remedy to which, on the basis of those rights, the plaintiff was entitled.

If the rights of the plaintiff under his contract were as the county court judge, as I think rightly, held them to be, then on the facts he became entitled: (a) to an account of commission due in respect of advertisements attributable to his canvassing and inserted in one or other of the defendants' newspapers between May 4 and May 28, 1950, and (b) to damages for having been deprived during the same period, May 4 to May 28, of the opportunity of obtaining further advertisements which would in the ordinary course have been inserted in the defendants' newspapers within that period. The two heads of claim are distinct: the first is a matter of certain ascertainment upon taking the account, the second is a matter of estimate based on previous

(24) [1917] 2 K. B. 87, 92.

(25) [1949] 1 All E. R. 526, 530.

experience. But there is, so far as I can see, no reason why a person in the position of the plaintiff should not rest his claim solely on his common-law right to damages for breach of contract —damages which would compensate him both for loss of commission accruing during the relevant period and also for loss of opportunity to earn further commission in the same period. And this, as seems to me clear, was exactly what was done by the judge in arriving at the sum of ten guineas for damages. For we know from documents supplied to us how the calculation was made: the judge proceeded on the basis that, as appeared from the evidence, the sum of 9*l*. a week would have been received by the plaintiff in commission had he continued in the defendants' service. To that had to be added the weekly fixed salary of 3*l*. The total (including the sum of 28*l*. 16*s*. 9*d*. for commission due for the month of April but unpaid) came to 80*l*. 15*s*. 3*d*. The defendants had since paid to the plaintiff the sum of 53*l*. 14*s*. 10*d*., and, after giving credit for this amount and certain other deductions (into the propriety of which we have not been invited to enter), the net amount due was 13*l*. 12*s*. 6*d*. Finally, the judge, to take account of the plaintiff's obligation to mitigate his damages, reduced the figure to the round sum of 10*l*. 10*s*. 0*d*.

I referred at the beginning of this judgment to the form of the plaintiff's notice of appeal. If the plaintiff were entitled to succeed on his argument as to the rights to which he was entitled under his contract, it would, in my view, have been impossible for him to get such an account as he sought while retaining in full the sum of damages awarded. Plainly the latter covered and was intended to cover the commission for which the defendants were accountable for the month of May. We were informed that the plaintiff's counsel asked at the trial for an account as well as for damages; but I cannot help thinking that the account sought must have related to commission in respect of advertisements inserted since the month of May. At any rate, it does not seem to me that the plaintiff can easily complain of the form of the relief granted, as such; for his particulars of damage proceeded upon precisely the same basis as that adopted by the judge.

It is, however, unnecessary for me to pursue further the question how, if the plaintiff succeeded in his claim as to rights, the damages awarded should have been brought into account. On the view which I take of the plaintiff's rights, I am clear that it would be quite wrong now to order an account. The plaintiff has not asked for such a limited account as I think he could have claimed, nor has he offered to give up or otherwise to bring into account the damages awarded. And, in any case, I do not think that, if such an account were taken and the damages limited as above intimated, the result would have been, for the plaintiff, substantially different from (if indeed it would have been as favourable as) the result arrived at by the county court judge.

For the reasons I have given, I think the appeal fails and should be dismissed: but, having regard to the view taken by my brethren, it will be allowed.

SINGLETON, L.J. The first difficulty in this case arises from the fact that the judge has not found what were the terms of the contract between the plaintiff and the defendants. It is pleaded in wide terms in para. 1 of the particulars of claim, and para. 1 of the defence admits the terms alleged in para. 1 of the claim, "save that the commission alleged was only payable to the "plaintiff if and when the relevant advertisements had actually "appeared in the defendants' newpapers". In his evidence the plaintiff said: "It was agreed that I was to receive 3*l.* per week "plus a commission of 7½ per cent. on all display space adver-"tisements and 12½ per cent. on all small classified advertise-"ments either obtained by me or those which I was instrumental "in obtaining for the firm. Commission was to be payable on "the advertisements appearing in the newspapers irrespective "of payment by the customer and it was to be payable "monthly". There does not appear to have been any real dispute as to this. I therefore conclude that the plaintiff was employed to obtain advertisements, or to sell advertising space, for the defendants, and that he was to be paid salary and commission. Sometimes commission earned would be paid in the month in which it was earned but sometimes it would not be paid until later, according to the times at which the advertisements appeared in the defendants' newspapers.

There is some uncertainty as to the meaning of the words "which I was instrumental in obtaining for the firm". I take them to cover the case in which the plaintiff did not in the first instance obtain a written order from the advertiser but the advertiser said he would consider the matter and later sent an order to the defendants as a result of the plaintiff's solicitation. I do not regard the words as covering repeat orders, though the particulars of claim might lead one to think that counsel for the plaintiff was taking that view. If that be so, it cannot affect the rights of the plaintiff, and in any event, Sir Godfrey Russell Vick made it clear in argument that he did not claim in respect of repeat orders. If the plaintiff in April obtained an order, accepted by the defendants, for an advertisement in one of the defendants' newspapers in May, June, and July, he did all that was required of him to earn commission on that order, but payment was not to be made to him by the defendants unless and until the advertisement actually appeared. He had done his part in obtaining the order; if the defendants accepted it, and inserted

C. A.
1951

SELLERS
v.
LONDON
COUNTIES
NEWSPAPERS.

Singleton, L.J

the advertisement, the plaintiff was then to be paid his commission; and the defendants could not by terminating the employment deprive the plaintiff of the commission which he had already earned (subject, of course, to the advertisement's appearing). This is the contract between the parties, and it is not necessary to imply any term into it. If the defendants' submission were right, it would be necessary to read into the contract some such term as "but you shall not be entitled to recover any "commission, even though earned otherwise, if it is not payable "until after your employment with us has ceased". The defendants themselves plead that commission was not payable until the advertisement was inserted; that might be in the month in which the order was obtained or it might not be until months later, according to the order—and it was for the defendants to determine whether they accepted an order or not. Any other view would have the result of depriving the plaintiff of part of his remuneration for work done during the period of his employment.

A more difficult question arises in respect of an order for an advertisement to continue "until cancelled". If the defendants accept from the plaintiff an order in these terms, and act upon it, I take the view that the plaintiff is entitled to commission. It is not a case of a repeat order as that expression is normally understood: it is an order obtained by the plaintiff during his employment and accepted by the defendants, and I do not see that a distinction can be drawn between this and an order for, say, twelve monthly, or weekly, insertions: in each case the insertion is the direct result of the order obtained by the plaintiff, and the defendants accept it with the knowledge that commission will be payable to the plaintiff.

I do not derive great help from the authorities which were cited to the court, many of which concerned questions in respect of repeat orders. The decision in each case must depend on the contract between the parties. The view which I have expressed seems to me to be in accord with the judgments in *Bilbee* v. *Hasse* (26) and *Levy* v. *Goldhill* (27). The defendants relied on the decision in *Marshall* v. *Glanvill* (28), in which case McCardie, J., said: "Prima facie the liability to pay commission in cases "of this kind ceases as to future trade with the cessation of the "employment in the absence of a reasonably clear intention to "the contrary". The judge was dealing with a case in which commission was payable on the net amount of trade done in a particular area, independently of whether orders were obtained by the plaintiff or not; quite a different type of case. Moreover, in the present case, the postponement of time of payment of

(26) 5 T. L. R. 677.
(27) [1917] 2 Ch. 297.
(28) [1917] 2 K. B. 87, 92.

commission (or remuneration) appears to me to show that the parties contemplated that payment might not become due until after the employment had ended from one cause or another. The plaintiff is asking for commission earned by him during his period of employment, and I am of opinion that he is entitled to the account for which he asks, i.e., an account of the orders obtained by him while he was in the defendants' employment and executed by them after he left it.

Apart from this, the plaintiff is entitled to some damages for breach of contract. If he had been given the notice to which the county court judge said he was entitled, namely, one month, he would during that time have had the opportunity of earning further commission, part of which might have become payable during the month or part at subsequent dates. Herein lies the second difficulty and one which would not have arisen if the claim for an account had been considered first. The judge rightly held that the plaintiff was entitled to damages, but the amount was arrived at on a wrong basis, since it took into account the amount of commission which became due in the month of May: that falls within the account with which I have dealt. The damages should have been assessed according to the loss suffered by the plaintiff through his being deprived of the opportunity of earning further commission during the period, in addition to loss of salary or wages. Strictly, there ought to be a new trial so that damages can be assessed on the proper basis; but it may be that the parties can agree upon a figure. I should imagine that 20*l.* would cover it.

It is impossible to say how the financial position will work out if and when an account is taken: there may be little in it having regard to the amount which the plaintiff received when he left. The real point of difference lies in whether the plaintiff is entitled to commission in respect of orders obtained by him before his employment ended and which have been executed by the defendants since that time. On that issue, I am of opinion that the plaintiff is entitled to succeed and I am in favour of allowing the appeal.

BIRKETT, L.J. [read by Singleton, L.J.]. All the important questions in this appeal depend upon the exact terms of the contract made between the parties in October, 1947. It was an oral agreement, and the absence of any written document makes it all the more desirable to have a clear and unambiguous finding by the judge of the oral terms. Much of the argument in this court, for example, turned on the question whether the plaintiff's right to be paid commission by the defendants ended on May 28, 1950, or whether he was entitled to an account of commission earned by him before that date, but not due to be paid to him until after that date. The judge decided that the plaintiff was entitled to a month's notice from the defendants to determine the contract; and that, as the defendants on April 28, 1950, had only given the plaintiff one week's notice, he had been wrongfully dismissed and was entitled to damages. The defendants could determine the contract on May 28. In the court below the precise terms of the contract do not seem to have been the subject of much controversy, and the judge has made no finding about them. This is, to say the least, a somewhat surprising thing, for in cases which relate to the payment of commission the exact terms of the contract are all-important. But it does not appear that there was very much doubt about what the plaintiff was employed to do. In his particulars of claim he had said that he was employed to get orders from customers for advertising space in the defendants' newspapers. He was to be paid a salary of 3*l.* a week, and a commission of 7½ per cent. on orders which he obtained for such advertising space and on orders sent direct to the defendants for such space from his customers. The defendants admitted this, only adding that the plaintiff was not to be paid his commission until the customers' advertisements were actually printed in the defendants' newspapers. In his evidence, the plaintiff repeated the foregoing, with an addition about the rate of 12½ per cent. on small classified advertisements obtained by him, or which he was instrumental in obtaining; and he said that he was to be paid on the advertisements being printed in the defendants' newspapers whether the customer paid or not, and that the commission was to be paid monthly.

It is therefore clear that so far as commission is concerned the plaintiff was entitled to it if (a) he had obtained the customer's order himself, or (b) the order had come direct to the defendants from one of the plaintiff's customers, and he had been instrumental in obtaining it, and (c) the defendants had printed the advertisement in their newspapers. No doubt there were different kinds of orders: there was the order for a single insertion obtained direct by the plaintiff; there was the order for a single advertisement which he was instrumental in obtaining and which came direct to the defendants; there were the orders for advertisements that were to appear more than once; and there may have been "repeat" orders sent by the customer without the intervention of the plaintiff. It was made quite clear that the plaintiff made no claim to commission on "repeat" orders. It might conceivably have been argued that he had been instrumental in obtaining them; but that argument was expressly disavowed, and the orders which he had been instrumental in obtaining were confined to those orders sent to the defendants from customers whom the plaintiff had seen but who had not actually given him the order at the time he saw them. The evidence as to the length of time that passed between the taking of the order and the printing of the advertisement was scanty. The plaintiff said that in the case of the single advertisement it usually appeared within a week of the taking of the order; but in the ordinary way one would have supposed that most single advertisements would have appeared within one month. It may therefore very well be that, if the plaintiff is entitled to an account, the sum to which he will be entitled will only be a very small one. The advertisements that were to appear more than once, unless they were to appear more than three or four times, might very well come within the month too. But the question is not what the amount of money may or may not be, but whether the plaintiff is entitled to the account for which he asks. The real bone of contention is whether the plaintiff is right in his submission that if advertisements were printed by the defendants after May 28, 1950, which the plaintiff obtained before that date, he is entitled to commission under the terms of his contract with them. The judge took the view that after May 28 the plaintiff could not claim any commission from the defendants, because his contract of service was wholly at an end. He awarded the plaintiff damages for the wrongful dismissal by the defendants, but refused him an account.

The damages awarded seem to have contained three elements: (a) the loss of salary up to May 28; (b) the commission accruing to the plaintiff during the month of May on the orders he had previously obtained and which had been printed; (c) the commission which he might have earned during the month of May if he had not been wrongfully dismissed. I do not think the second item was strictly damages at all, but in any event it was a sum to which he was clearly entitled. In a word, the judge proceeded on the basis that the plaintiff was a whole-time servant of the defendants, paid, it is true, by salary and commission, and subject to one month's notice. At the end of the month's notice the service was wholly determined, and the plaintiff had no more claim on the defendants of any kind. It was exactly the same as if he had been paid a fixed salary only, and the arrangements about the payment of commission could be disregarded after the month's end. If the plaintiff had obtained orders for his employers during his employment, and those orders were printed after May 28, then the plaintiff had no right to any commission on those orders because the employment had ended.

For myself, I cannot think that that is the proper way to regard the particular contract in this case. If there had been a term of the contract that all right to commission ended with the termination of the employment (as there might well have been if that was the intention of the parties) no question could have arisen. But when the terms of the contract which was made are examined, and in particular the provisions for the time of payment being postponed until the actual printing of the advertisement, which was a matter entirely for the defendants, and quite outside the control of the plaintiff, I find it a little difficult to regard this case as the simple case of master and servant and exactly on the same footing as the case where the remuneration was a fixed sum paid weekly.

Having been wrongfully dismissed, as the judge found, the plaintiff was entitled to damages for loss of salary, and for being deprived of the opportunity to earn commission. He was also entitled, in any event, to the commission he had earned and which was due under the contract at the end of the month. I think he was also entitled to the commission on any orders he obtained for the defendants whilst he was employed by them, if they were in fact printed by the defendants after May 28. This is, of course, the vital issue in the case. To decide otherwise would be to decide that, although the plaintiff had fulfilled his part of the contract, having obtained the orders in the course of his employment, and although the defendants had printed them and thus had the benefit of his work, nevertheless he was not to have what the contract promised him, because when the time for payment came he had been dismissed.

In my view, the plaintiff is entitled to the account for which he asks, and the second element in the judge's award of damages should strictly form part of that account. Both my Lord and Singleton, L.J., have referred to some of the cases which were cited to us. I do not think they help very much to decide the point of controversy in this case. Both *Nayler* v. *Yearsley* (29) and *Boyd* v. *Mathers and "South Africa" (Ld.)* (30) turned on the question of "renewals", as did *Gerahty* v. *Baines & Co. Ld.* (31). In *Marshall* v. *Glanvill* (32) the facts were very different from those of the present case, and the language of McCardie, J., must be read in the light of the special facts of the case before him. Morris, J., in *Crocker Horlock Ld.* v. *B. Lang & Co. Ld.* (33) was concerned with "repeat orders", and based his judgment on the fact that the parties had not made any arrangement about the payment of commission on "repeat "orders" after the ending of the contract. The plaintiff in the present case, apart from the nominal sum of 3*l*. a week, was dependent upon the work he did and the success he achieved for his remuneration. This arrangement, no doubt, was to stimulate him to use his best endeavours and thus benefit himself and the

(29) 2 F. & F. 41.
(30) 9 T. L. R. 443.
(31) 19 T. L. R. 554.
(32) [1917] 2 K. B. 87.
(33) [1949] 1 All E. R. 526.

defendants. Nothing was said to him to indicate that he was not to have the benefit from his work, if when the moment came for payment he had left the employment of the defendants; and it seems to me to follow that, if he did obtain orders for advertisements and the defendants in due course printed the advertisements, his commission was to be payable notwithstanding that he had left the employment when the advertisements were inserted.

I think he is entitled to the account for which he asks, and I should be in favour of allowing the appeal, much as I regret having to differ from the judgment of the Master of the Rolls, which I do with some diffidence.

Appeal allowed.

Solicitors: *Rollit, Sons & Haydon; Tucker, Turner & Co.*

B. A. B.

ALEXANDER *v.* SPRINGATE AND ANOTHER.

1951
Jan. 18.
Streatfeild, J.

[1950 A. 3381.]

Landlord and tenant—Proceedings by tenant pending before rent tribunal—Notice to quit served before decision—Effect—Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 5.

Where a notice to quit is served on a tenant while a reference by him of his tenancy to a rent tribunal is pending, the effect of s. 5 of the Furnished Houses (Rent Control) Act, 1946, is not to make such notice invalid but to postpone its operation until three months after the decision of the rent tribunal.

ACTION.

In March, 1950, the plaintiff, Mrs. Alexander, let two rooms of a house at 67 Greenfield Gardens, London, N.W.2, to the defendant, Mrs. Springate, at a weekly rent of 2*l*. 15*s*. During the summer of 1950 the tenant referred the tenancy to the local rent tribunal; and on July 19, 1950, her rent was reduced to 2*l*. 5*s*. weekly. On July 7, before the decision of the rent tribunal was given, the landlord's solicitors served the tenant with notice to quit requiring possession on July 17 or at the end of the week of the tenancy which should expire next after one week from the date of service of the notice.

The landlord claimed possession of the rooms, alleging that the notice to quit of July 7 became effective on October 19, 1950, by virtue of s. 5 of the Furnished Houses (Rent Control) Act, 1946 (1). The tenant contended that the notice was a nullity in view of that section.

D. Weitzman for the landlord.
Claude Duveen for the tenant.

STREATFEILD, J. The question of law for my consideration is one which has not been in terms decided, and it arises on the proper construction of s. 5 of the Furnished Houses (Rent Control) Act, 1946. It is contended for the landlord that the notice of July 7, although it was a week's notice, in fact became effective on October 19, 1950. Mr. Duveen, on the other hand, has contended for the tenant that the words of that section render that notice completely null. The words of s. 5 do not seem to me to be capable of the construction that the notice ceases to be valid, so that what is otherwise, on the face of it, a good notice becomes a bad one for all time. What the section appears to me to imply is that the notice is still recognized as being a good notice, only with the difference that it shall not take effect before the expiration of three months.

My attention was directed to some correspondence in the Solicitors Journal of December, 1950, discussing what was meant by a notice to quit "taking effect". That seems to me a perfectly simple problem: if one gives notice of termination of employment to one's servant, the "taking effect" of that notice is surely when the employment is to terminate, not the date when the notice is given. A notice to quit is a notice to the tenant to quit the premises: it does not take effect as a notice when it is given. The "effect" is the result which the notice seeks to achieve, namely, termination of the tenancy, and so the words "take effect" clearly can only apply to the time when that tenancy is to terminate in the words of the notice to quit.

Accordingly, in my view the proper construction of s. 5 of the Act of 1946 is that the notice remains a perfectly good one, but that its effect is postponed until three months after the decision of the rent tribunal even though it [the notice] was expressed to take effect at an earlier date. This appears to be a statutory extension of the notice to quit itself, and I think that s. 11 of the Landlord and Tenant (Rent Control) Act, 1949,

---

(1) Furnished Houses (Rent Control) Act, 1946, s. 5: "If, after a "contract to which this Act applies "has been referred to a tribunal by "the lessee or by the local authority "(either originally or for reconsideration), a notice to quit the premises "to which the contract relates is "served by the lessor on the lessee "at any time before the decision of "the tribunal is given or within three "months thereafter, the notice shall "not take effect before the expiration "of the said three months".

1951

ALEXANDER v. SPRINGATE.

Streatfeild, J.

although it applies to unfurnished premises, recognizes that that is the proper construction of s. 5 of the Act of 1946.

I was referred to this contrary submission in Megarry on the Rent Acts (5th ed.), p. 89: "If a notice to quit expires during "a period of ineffectiveness the Act appears to render it a nullity "and not to postpone its operation until the end of the period, "although the Act of 1949 seems to assume the contrary". With respect, I hold the contrary on the proper construction of s. 5 of the Act of 1946.

Accordingly, in my view this notice, instead of terminating the tenancy on July 17, effectively terminated it on October 19, 1950, three months after the decision of the rent tribunal. It follows that the landlord is entitled to an order for possession.

Judgment for the plaintiff.

Solicitors: *Gale & Phelps; Walford & Co.*

S. C.

CURTIS v. CHEMICAL CLEANING AND DYEING CO.

[Plaint No. F. 2012.]

C. A.

1951
Feb. 15, 16.

Somervell, Singleton and Denning, L.JJ.

Contract—Negligence—Dress left for cleaning—Damage—Conditions on receipt exempting cleaners from liability for damage however caused—Receipt signed by plaintiff—Innocent misrepresentation by shop assistant.

When the plaintiff took a white satin dress to the defendants' shop to be cleaned she was given a paper headed "Receipt" and was asked by a shop assistant to sign it. The plaintiff inquired why her signature was required and the assistant replied, in effect, that the defendants would not accept liability for certain specific risks, including the risk of damage by or to the beads and sequins with which the dress was trimmed. In fact the "receipt" contained a condition that the cleaners accepted no liability for any damage however arising. When the dress was returned to the plaintiff it was found to be stained, and she was awarded damages by the county court judge, who held that the defendants had been guilty of negligence and were not protected by their exemption clause by reason of misrepresentation as to its character. On appeal by the defendants:—

Held, that the defendants could not rely on the exemption clause because their assistant by an innocent misrepresentation had created a false impression in the mind of the plaintiff as to the extent of the exemption and thereby induced her to sign the receipt.

Per Denning, L.J. Any behaviour, by word or conduct, was sufficient to be a misrepresentation if such as to mislead the other party about the existence or extent of the exemption. If it conveyed a false impression that was enough. Such an impression might even be conveyed by simply handing the document to the customer as if it were a receipt, or by asking her to sign it without drawing attention to the condition.

L'Estrange v. *F. Graucob Ld.* [1934] 2 K. B. 394; *Olley* v. *Marlborough Court,* [1949] 1 K. B. 532; *Rex* v. *Kylsant (Lord)*, [1932] 1 K. B. 442; and *Low* v. *Bouverie,* [1891] 3 Ch. 82, applied.

APPEAL from Judge Blagden, sitting at Westminster county court.

The plaintiff, Mrs. Curtis, took to the shop of the defendants, Chemical Cleaning and Dyeing Co., for cleaning, a white satin wedding dress, and was handed by a shop assistant a paper headed "Receipt", which she was asked to sign. Before doing so the plaintiff asked the assistant why her signature was required, and was told (according to the plaintiff) that it was because the defendants would not accept liability for certain specified risks, including the risk of damage by or to the beads and sequins with which the dress was trimmed. The plaintiff then signed the "receipt", which in fact contained the following condition: "This or these articles is accepted on condition that the company "is not liable for any damage howsoever arising, or delay".

When the dress was returned to the plaintiff there was a stain on it which could not be explained, and the plaintiff brought the present action claiming damages. The defendants denied negligence and also relied on the exemption from liability contained in the signed receipt.

The county court judge held that the onus of showing that the damage was not due to their negligence was on the defendants; that they had failed to discharge that burden; and that because of innocent misrepresentation by the shop assistant they could not rely on the condition contained in the receipt. He therefore awarded the plaintiff 32*l*. 10*s*. damages.

The defendants appealed against the finding of misrepresentation.

Geoffrey Lawrence, K.C., and *A. M. Wallace* for the defendants.

Turner-Samuels, K.C., and *D. J. Turner-Samuels* for the plaintiff.

The argument for the defendants sufficiently appears from the judgments. Counsel for the plaintiff were not called upon to argue.

SOMERVELL, L.J., stated the facts, and continued:—The finding of negligence by the county court judge is not challenged, but the defendants sought to rely on an exemption as to liability contained in a document which the plaintiff had been asked to sign and which was headed "Receipt". It sets out her name and address and the description of the dress to be cleaned and pressed. The material words of it, which are in the bottom right-hand corner under the amount which is to be charged, are: "This or these articles is accepted on condition that the company "is not liable for any damage howsoever arising, or delay". On the basis that that would exempt the defendants from liability for negligence the plaintiff alleges that she was induced to sign that receipt by misrepresentation.

This appeal is with reference to a very short point which depends to my mind on the meaning to be given to the judge's findings in regard to the evidence. He says: "I was satisfied "that in fact the assistant who received the plaintiff's garment ". . . when asked by the plaintiff why her signature was required, "said (whatever her actual words) something to the effect that "the defendants would not accept liability for certain specified "risks, including the risk of damage by or to beads and sequins. "She did not tell the plaintiff that the defendants sought to "exclude any liability for damage however caused, and this, it "seemed to me, was a misrepresentation, though a perfectly "innocent one, of the document's effect".

The judge then referred to the statement of Scrutton, L.J., in *L'Estrange* v. *F. Graucob Ld.* (1), which reads: "When a document containing contractual terms is signed, then, in the "absence of fraud, or, I will add, misrepresentation, the party "signing it is bound, and it is wholly immaterial whether he has "read the document or not". There was some evidence, which was admitted by the judge, as to the instructions given to the assistant with regard to getting customers to sign a "receipt" of this kind. I am not sure that it is material, but from the note I would gather that the intention of those who gave the instructions was that in cases of certain articles, where damage was not anticipated, the assistant was told not to trouble about getting the customer to sign. But in cases where the article was such that, in the experience of the defendants, damage might occur without negligence, then customers should be asked to sign. Beads and sequins, which this dress had on it, are adornments which are apt to get damaged in cleaning. It may well be that those instructions might not be fully understood by those who had to carry them out.

Mr. Lawrence submitted on behalf of the defendants that we should read those findings as meaning that the assistant conveyed the impression that the defendants were not liable for damage,

(1) [1934] 2 K. B. 394, 403.

C. A.
1951

Curtis v. Chemical Cleaning and Dyeing Co.

Somervell, L.J.

and that beads and sequins were given merely as examples of that non-liability. I cannot so read the finding of the judge. We were referred quite rightly to the notes of the evidence, which seem to me amply to support the construction which I put on the passage. Indeed in my opinion it is the only construction which it can bear. What was conveyed to the plaintiff, in my view, was that there were certain risks, in this case beads and sequins, which the defendants were not prepared to accept. She was asked to sign this document and she thought that its purpose was to exempt them from liability for beads and sequins, and that alone. That, I think, plainly is a misrepresentation. The words on the document purported to exempt them from all liability, howsoever arising. In those circumstances, I think, owing to that misrepresentation, this exception never became part of the contract between the parties. Mr. Lawrence did comment on the fact that there was no finding in terms that the plaintiff was induced to sign by the misrepresentation, but I think that the note of her evidence makes it clear that she was so induced. On her evidence, which the county court judge clearly accepted, she asked why she had to sign the document. Obviously the answer which she received was what induced her to sign it.

For these reasons I think that this appeal must be dismissed.

Singleton, L.J. I agree.

Denning, L.J. This case is of importance because of the many cases nowadays when people sign printed forms without reading them, only to find afterwards that they contain stringent clauses exempting the other side from their common-law liabilities. In every such case it must be remembered that, if a person wishes to exempt himself from a liability which the common law imposes on him, he can only do it by an express stipulation brought home to the party affected, and assented to by him as part of the contract: *Olley* v. *Marlborough Court* (2). If the party affected signs a written document, knowing it to be a contract which governs the relations between them, his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation: *L'Estrange* v. *Graucob* (3). But what is a sufficient misrepresentation for this purpose? That is the point which Mr. Geoffrey Lawrence has raised in this appeal.

In my opinion any behaviour, by words or conduct, is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression, that is enough. If the false impression is created knowingly, it is a fraudulent misrepresentation; if it is created unwittingly, it is an innocent misrepresentation; but either is sufficient to disentitle the creator of it to the benefit of the exemption. In *Rex* v. *Kylsant* (*Lord*) (4) it was held that a representation might be literally true but practically false, not because of what it said, but because of what it left unsaid; in short, because of what it implied. This is as true of an innocent misrepresentation as it is of a fraudulent misrepresentation. When one party puts forward a printed form for signature, failure by him to draw attention to the existence or extent of the exemption clause may in some circumstances convey the impression that there is no exemption at all, or at any rate not so wide an exemption as that which is in fact contained in the document. The present case is a good illustration. The customer said in evidence: "When I was asked to sign the document I asked "why? The assistant said I was to accept any responsibility "for damage to beads and sequins. I did not read it all before "I signed it". In those circumstances, by failing to draw attention to the width of the exemption clause, the assistant created the false impression that the exemption only related to the beads and sequins, and that it did not extend to the material of which the dress was made. It was done perfectly innocently, but nevertheless a false impression was created. It was probably not sufficiently precise and unambiguous to create an estoppel: *Low* v. *Bouverie* (5); but nevertheless it was a sufficient misrepresentation to disentitle the cleaners from relying on the exemption, except in regard to beads and sequins.

---

(2) [1949] 1 K. B. 532.

(3) [1934] 2 K. B. 394.

In the present case the customer knew, from what the assistant said, that the document contained conditions. If nothing was said she might not have known it. In that case the document might reasonably be understood to be, like a boot repairer's receipt, only a voucher for the customer to produce when collecting the goods, and not understood to contain conditions exempting the cleaners from their common-law liability for negligence. In that case it would not protect the cleaners: see *Chapelton* v. *Barry Urban District Council* (6). I say this because I do not wish it to be supposed that the cleaners would have been better off if the assistant had simply handed over the document to the customer without asking her to sign it; or if the customer were not so inquiring as the plaintiff, but were an unsuspecting person who signed whatever she was asked without question. In those circumstances the conduct of the cleaners might well be such that it conveyed the impression that the document contained no conditions, or, at any rate, no condition exempting them from their common-law liability, in which case they could not rely on it.

---

(4) [1932] 1 K. B. 442.

(5) [1891] 3 Ch. 82.

(6) [1949] 1 K. B. 532.

The second point made by Mr. Geoffrey Lawrence was that, even if there was an innocent misrepresentation, the plaintiff cannot in point of law avoid the terms of the contract. He said that an innocent misrepresentation gives no right to damages but only to rescission; that rescission was not possible because the contract was executed; and that in any case rescission was of no use to the plaintiff because, once rescission has taken place, there would be no contract to sue upon. That is an attractive argument, but I do not think that it is right. One answer to it is that an executed contract can in a proper case be rescinded for innocent misrepresentation; and if this contract was rescinded the plaintiff could sue in tort for negligence, because the defendants, having entered upon the task of cleaning the dress, were under a duty to do it carefully. I do not pursue this, however, because I prefer to put it more simply. In my opinion when the signature to a condition, purporting to exempt a person from his common-law liabilities, is obtained by an innocent misrepresentation, the party who has made that misrepresentation is disentitled to rely on the exemption. Whether you call that a rule of law or equity does not matter in these days. We have got too far beyond 1873 to trouble about distinctions of that kind. Scrutton and Maugham, L.JJ., in *L'Estrange* v. *Graucob* (7) treated it as plain. I therefore agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *E. F. Iwi for Hanchett Copley & Hails, Edgware; Pearce & Sons.*

A. W. G.

(7) [1934] 2 K. B. 394.

ROSE *v.* MATT.

1951
Jan. 19.

Lord Goddard, C.J., and Devlin, J.

Criminal law—Larceny—Bailment of clock as security for debt of owner—Fraudulent re-taking by owner—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *ss.* 2, 1, *sub-s.* 2 (*iii*).

By s. 1, sub-s. 2 (iii) of the Larceny Act, 1916: "the expression 'owner' includes any part owner, or person having possession or control of, or a special property in, anything capable of being stolen".

An owner of goods who entrusts them to another person in such circumstances that the latter has a special property in them, is guilty of larceny if he fraudulently takes them away again; and it is immaterial that the owner in so removing them did not intend to charge the other person as a bailee with their loss.

CASE STATED by Stamford justices.

An information was preferred against the defendant, Peter John Matt, alleging that between August 25 and September 1, 1950, he feloniously stole a travelling clock the property of one Simpson, a general woodworker, contrary to s. 2 of the Larceny Act, 1916.

On the hearing of the information the following facts were proved or admitted:—

At midday on August 26, 1950, the defendant called at Simpson's workshop, and inquired about a model aircraft engine and parts, which Simpson then had in stock and of which the price was 2*l*. 10*s*. The defendant said that he had not got the money, and Simpson told him that he would accept a deposit of 1*l*. The defendant, however, went away, but he returned at 4 p.m. on the same day with a travelling clock worth 3*l*. which belonged to him. Simpson accepted the clock as security for the model aircraft engine on condition that, if the money was not paid within one month, he could sell the clock.

The defendant then took the model aircraft engine away and was given a copy of the account for the amount due from him. Simpson put the clock on a table in the showroom above his shop and last saw it there in the evening of August 26, 1950. When he next returned to the shop on August 31 at about 8.30 a.m. the clock was missing.

On a day towards the end of August the defendant called at the shop and saw in the showroom above it Simpson's mother. He left the premises after buying some engine parts. The mother did not know that the clock was in the showroom and did not see the defendant take it. The defendant, when subsequently interviewed by the police, admitted that he had taken the clock away while the mother was not looking because he thought that Simpson would sell it before he, the defendant, could pay the money.

It was contended on behalf of the prosecutor that Simpson was the "owner" of the travelling clock within the definition of s. 1, sub-s. 2 (iii), of the Larceny Act, 1916 (1); and that the defendant was guilty of an offence under s. 2 of the Larceny Act, 1916.

It was contended on behalf of the defendant that the travelling clock was lodged by him with Simpson as security, that the property in the clock remained in the defendant, and that although Simpson had a special interest in the clock the defendant remained the owner as between him and Simpson and could not be convicted of stealing his own property. It was further contended that the definition of owner in s. 1, sub-s. 2 (iii), of the Larceny Act, 1916, was intended to apply to cases of theft by a third party from the bailee or other person having possession and did not affect the position between the owner, in the common law meaning of the word, and the bailee; and that an owner who had parted with the possession of property in these circumstances could not be convicted of larceny unless it could be established that the bailee had thereby become chargeable.

---

(1) By s. 1, sub-s. 2 (iii) of the Larceny Act, 1916: "the expression "'owner' includes any part owner, "or person having possession or control of, or a special property in, "anything capable of being stolen".

The justices dismissed the information.✓ They were of opinion that, although Simpson was the owner of the clock within the meaning of the definition in s. 1, sub-s. 2 (iii), of the Larceny Act, 1916, the defendant in taking it did not intend to charge the bailee with its loss,✓ and that there was no evidence to show that the taking of it had the effect of charging the bailee.✓

The prosecutor appealed.

T. R. F. Butler for the prosecutor. "Owner" was first defined in s. 1, sub-s. 2 (iii), of the Larceny Act, 1916. It is stated in Halsbury's Laws of England, 2nd ed., Vol. 9, para. 864: "A man may be convicted of stealing his own goods, if such goods "are in the possession of his bailee and the intention of the "accused is either fraudulently to charge the bailee with the loss "of the goods or, to deprive the bailee of his special property in "the goods . . .".

The cases decided before the Act of 1916 was passed proceeded on the ground that the taking of the goods by the owner had the effect of charging the bailee with their loss: see *Rex* v. *Bramley* (2); *Reg.* v. *Webster* (3) and *Reg.* v. *Burgess* (4). But that intention is no longer necessary to render an owner guilty of larceny if he feloniously takes away his goods from a bailee who has a special property in them and is therefore an "owner" within the meaning of s. 1, sub-s. 2 (iii), of the Act of 1916. The taking here was felonious, and the defendant should have been convicted of larceny.

The defendant did not appear and was not represented.

LORD GODDARD, C.J. This case raises what appears to be a new point in the law of larceny, but only a new point in the sense that there does not seem to be a case which precisely covers it. For all essential purposes our decision may be founded on the reasoning which supported the conviction of larceny in *Rex* v. *Wilkinson* (5) in 1821. But we have to decide the present case with the advantage of the definitions in the Larceny Act, 1916. That Act is entitled: "An Act to consolidate "and simplify the law relating to larceny triable on indictment "and kindred offences". The old cases may be of assistance in the construction of the Act, but if the words of the Act are clear they govern the decision which this court must now give.

---

(2) (1821) Russ. & Ry. 478.

(3) (1861) Leigh & Ca. 77; 31 L. J. (M. C.) 17.

(4) (1863) Leigh & Ca. 299; 32 L. J. (M. C.) 185.

(5) (1821) Russ. & Ry. 470.

[His lordship stated the facts, read s. 1, sub-ss. 1, 2 (iii), and continued:—] It is quite clear that Simpson had a special property in the clock: he had the right to hold it as security. The defendant intended permanently to deprive him of that special property, because he took back that which he had left with him as security and took it back during the time when Simpson was entitled to hold it with a view to selling it if the price of the model aircraft engine were not paid.

The justices took the view that this was not a case of larceny, for they found that the defendant did not take the clock with the intention of thereafter making a fraudulent charge against Simpson of having converted it or refused to return it. For if a bailee either refuses to return goods bailed to him or is unable to produce them and cannot show that he has lost them without negligence, the owner can maintain an action against him. It is clear that many of the old cases which raise the question whether in these circumstances a man is guilty of larceny have been decided on the ground that the defendant intended to charge the bailee in an action of detinue, and that he had taken the goods fraudulently for that purpose. For instance, in Hale's Pleas of the Crown (Vol. 1), p. 513, it is stated: "If A bail goods to B and "afterwards animo furandi steals the goods from B with design "probably to charge him for them in an action of detinue, this "is a felony". The justices here took the view that, as they were satisfied that the defendant did not intend to charge Simpson with the loss of the clock, that is to say, to bring an action against him if the clock were not forthcoming at the end of the month, he had not committed felony. They were referred to *Rex* v. *Wilkinson* (6), a case which had been reserved for the opinion of all the judges. There the owners of goods, intending to deprive the revenue of duties, put them on to a company's boat for the purpose of having them taken to a ship, and then fraudulently took the goods back out of the custody of the company. This was held by the majority of the judges to be larceny because the company "had a right to the possession until "the goods reached the ship: they had also an interest in that "possession, and the intent to deprive them of their possession "wrongfully and against their will, was a felonious intent as "against them, because it exposed them to a suit upon the

---

(6) (1821) Russ. & Ry. 470.

"bond". It might have exposed them to a suit upon the bond, but whether or not the defendants intended to expose them to such a suit does not seem to have been the governing consideration. In any case the law has now been clarified by the Larceny Act and it is clear that an owner of goods who entrusts them to another person, in such circumstances that the latter has a special property in them, is guilty of larceny if he fraudulently takes them away again. There is no question here that the defendant was acting fraudulently; he was acting dishonestly, and so the justices found.

The case, therefore, must go back to the justices with an intimation that it is covered by s. 1, sub-s. 2 (iii), of the Larceny Act, and that in the circumstances which have been proved the defendant was guilty of larceny and they must therefore convict.

DEVLIN, J. I agree.

Appeal allowed.
Case remitted.

Solicitors: *Vizard, Oldham, Crowder & Cash, for T. Norton, Son & Hamilton, Grantham.*

S. C.

1951
Jan. 17, 18, 26.

Lord Goddard, C.J., Hilbery and Devlin, JJ.

FERGUSON *v.* WEAVING.

Licensing—Drinking after hours by customers at public house—Waiters acting contrary to instructions—Liability of licensee—Summary Jurisdiction Act, 1848 (11 & 12 *Vict. c.* 43), *s.* 5—*Licensing Act,* 1921 (11 & 12 *Geo.* 5, *c.* 42), s. 4.

By s. 4 of the Licensing Act, 1921, " . . . no person shall, except "during the permitted hours—(*a*) either by himself, or by any "servant or agent, sell or supply to any person in any licensed "premises . . . any intoxicating liquor. . . . (*b*) consume in "any . . . such premises . . . any intoxicating liquor".

In the absence from the Act of 1921 of any provision making it a substantive offence for a licensee to suffer or permit persons on the licensed premises to consume intoxicating liquors outside permitted hours, it is not sufficient to render the licensee guilty of aiding and abetting customers in contravening s. 4 that servants, such as waiters, to whom he has entrusted the control and management of the premises were aware, though he was not, of what those customers were doing.

Secus, if the Act had made it a substantive offence for a licensee to suffer or permit the consumption on the premises of intoxicating liquors after hours.

[Reported by MISS E. DANGERFIELD, Barrister-at-Law.]

The licensee of extensive licensed premises had instructed the waiters to see that customers did not continue to drink intoxicating liquors on the premises after 10 p.m. As 10 p.m. approached she gave from a central position the appropriate signals by means of the electric lighting to indicate that last orders should be given and a further signal at 10 p.m. indicating "Time". The waiters in one of the rooms, contrary to their instructions, did not take the necessary steps to see that drinks were consumed or surrendered when "Time" was indicated, and, when police officers entered the premises some minutes after 10 p.m., they found among seventy to eighty persons seated at tables or leaving the room, ten seated at tables and still drinking intoxicating liquor. Those persons were charged with contravening s. 4 (*b*) of the Act of 1921, and the licensee with counselling and procuring their offence.

Held, that the licensee, who was unaware of what was happening, could not be convicted of counselling and procuring on the basis of imputation to her of the knowledge of the waiters because it must first be shown that she knew the essential matters which constituted the offence. Assuming that the licensee had delegated to the waiters the conduct and management of the room in question, then, if the Act had made it an offence for a licensee knowingly to permit intoxicating liquor to be consumed after hours, the fact of the delegation to the waiters would have made their knowledge hers and she would have been guilty. But to hold that their knowledge could be imputed to her so as to make her, not a principal offender, but an aider and abettor would be to establish a new principle of criminal law for which there was no authority.

Quære (1.) whether, where counselling and procuring alone are alleged, there must be a proof of something more than would establish a case of being an accessory before the fact, and whether, consequently, the licensee could in any event have been held guilty of counselling and procuring; and (2.) whether the waiters could have been prosecuted for aiding and abetting the customers.

Linnett v. *Metropolitan Police Commissioner* [1946] K. B. 290 distinguished.

Johnson v. *Youden* [1950] 1 K. B. 544 applied.

CASE STATED by the Leeds stipendiary magistrate.

Informations were preferred by Chief Inspector of Police Sholto Ferguson alleging that ten persons were each guilty of an offence against s. 4 of the Licensing Act, 1921 (1), in consuming intoxicating liquor on March 18, 1950, outside permitted hours, namely, at eighteen minutes past 10 p.m., and that the defendant, Mrs. P. I. Weaving, aided and abetted, counselled and procured the offences, contrary to s. 5 of the Summary Jurisdiction Act, 1848 (2).

---

(1) Licensing Act, 1921, s. 4: ". . . no person shall, except during "the permitted hours—(*a*) either by "himself, or by any servant or agent, "sell or supply to any person in any "licensed premises or club any "intoxicating liquor to be consumed "either on or off the premises; or (*b*) "consume in or take from any such "premises or club any intoxicating "liquor".

At the hearing of the informations, the following facts were proved or admitted:—The defendant was the licensee of the Oakwood Hotel, Easterly Road, Leeds, which had four main rooms on the ground floor. Permitted hours under the Licensing Act, 1921, ended at 10 p.m. On March 18, 1950, police officers entered the hotel at about 10.18 p.m. They found in the concert room sixty or seventy persons seated at tables, and others leaving the premises. Of those sitting at tables, the ten persons named in the informations were in the act of consuming beer or stout, or were in possession of glasses of beer or stout.

When the police entered, and throughout the permitted hours on that evening, there were on duty in the concert room three waiters and a doorman, all employed by the licensee. Other waiters were on duty in the other rooms, and the duties of all of them included the prevention of drinking after permitted hours and the collection of glasses at 10 p.m. The licensee had instructed the waiters that at 10 p.m. they must collect, first, glasses containing intoxicating liquor, calling on the persons having the glasses either to drink the contents or to surrender the glasses.

On the evening in question the licensee was in the service bar in the central part of the premises. From there she gave two signals: at 9.55 p.m. she flicked one electric light in each room off and on to indicate that customers should give their last orders. At 10 p.m. from the same position she switched off one of the electric chandeliers and the electric fans in each room, and the waiters in each room called out "Time". She then went to the smokeroom and from there into the lounge. She was on her way back to the service bar with the intention of going into the concert room when she became aware that the police officers were there.

It was not disputed that if the waiters had properly carried out their instructions, all glasses, whether empty or containing liquor, would have been collected throughout the premises by 10.10 p.m. One or more of the waiters in the concert room failed to carry out his or their instructions properly.

At the hearing before the magistrate, the offences committed by the ten persons were proved and no appeal was brought against their conviction. The charge against the licensee was amended by deleting the words "aid and abet", the prosecutor contending that in the circumstances one or more of the licensee's servants in the concert room either knew of or connived at the offences by the ten persons named in the informations and that the presence or knowledge of the licensee's servants to whom she had delegated the management of the room, were those of the licensee herself. The licensee contended that she was not present when the offences were committed, did not know of them and was not guilty of counselling or procuring them.

---

(2) Summary Jurisdiction Act, 1848, s. 5: "... every person who 'shall aid, abet, counsel, or procure "the commission of any offence which "is or hereafter shall be punishable "on summary conviction shall be "liable to be proceeded against and "convicted for the same ...".

The magistrate was of the opinion that the licensee was present on the premises both actually and constructively through the presence of her servants; that she did everything that she could to see that the requirements of the law were complied with; that the question was whether, because her servants failed in their duty, she could be said to be actively or constructively assisting in the commission of the offences; and that, as he found as a fact that the licensee neither assisted nor connived in the failure of duty of a waiter or waitress, the information against her should be dismissed.

The prosecutor appealed.

P. Stanley-Price for the prosecutor. As the Licensing Acts impose an absolute prohibition against consumption of drinks after hours, it is not necessary to prove mens rea in the offender. [He referred to *Mousell Brothers Ld.* v. *London and North-Western Railway Co.* (3) and *Police Commissioners* v. *Cartman* (4).] If the licensee had been present when the offence was committed, she would have been guilty of aiding and abetting it; and even though she was not present she is liable because her servants, to whom she had delegated her responsibility for the proper conduct of the room were present, for she is responsible for their acts done within the scope of their authority: see *Linnett* v. *Metropolitan Police Commissioner* (5).

The responsibility of the licensee for the conduct of the licensed premises is described in *Mellor* v. *Lydiate* (6). There is an absolute prohibition against a licensee's suffering or permitting consumption of drinks after hours, and it was the licensee's duty here to prevent an offence from being committed. The servants knew that an offence was being committed and their knowledge will be imputed to her so as to make her guilty of aiding and abetting. [He referred to *Somerset* v. *Hart* (7).] Knowledge of a servant will be imputed to his master not only where a substantive charge is made, but also where the charge is of aiding and abetting. [He referred to *Ackroyds Air Travel Ld.* v. *Director of Public Prosecutions* (8).]

(3) [1917] 2 K. B. 836, 846.
(4) [1896] 1 Q. B. 655, 657.
(5) [1946] K. B. 290, 294.
(6) [1914] 3 K. B. 1141, 1153.
(7) (1884) 12 Q. B. D. 360.
(8) (1950) 48 L. G. R. 398.

It is submitted that "aiding and abetting" and "counselling "and procuring" mean the same thing: see *Gould & Co. Ld.* v. *Houghton* (9). The licensee "procured" the offence. To support that charge, it is sufficient to show that she had actual or constructive knowledge that the offence was being committed: it is not necessary to prove that she was present either actually or constructively while it was being committed.

[Counsel also referred to *Rubie* v. *Faulkner* (10); *Thomas* v. *Lindop* (11); *Allen* v. *Whitehead* (12); *Barker* v. *Levinson* (13); and *Bowker* v. *Woodroffe* (14).]

G. Pollock for the defendant licensee. The ultimate question is whether a person can be guilty of aiding and abetting if he merely aids and abets a person who is himself aiding and abetting. Under s. 4 of the Licensing Act, 1921, no absolute duty is imposed on a licensee to prevent the consumption, unlike, for example, the prohibition against supplying liquor to a police constable on duty, which does impose a duty on the licensee: see *Sherras* v. *De Rutzen* (15). There is no authority for holding that a master can be vicariously liable for a statutory offence, except where there has been a breach of an absolute duty imposed on him. The Act does not create an offence of "permitting or "suffering" consumption.

The charge against the licensee is of "counselling or pro- "curing" the offence and there is no evidence to support such a charge. The definition of those words in Stroud's Judicial Dictionary (2nd ed.), p. 419, shows that they are terms of art to describe an accessory before the fact. Further, the words imply a state of mind on the part of the person charged—actively counselling or procuring the commission of the offence. It is not sufficient to prove the state of mind of somebody else. A charge of aiding and abetting, on the other hand, is appropriate where a person is accessory during or after the commission of the offence. But it is conceded that all four words can be used together without duplicity of charge: see *In re Smith* (16).

Stanley-Price replied.

Cur. adv. vult.

January 26. LORD GODDARD, C.J., reading the judgment of the court, referred to the amendment of the charge by deleting the words "aid and abet", and continued: It is well known that the words "aid and abet" are apt to describe the action of a person who is present at the time of the commission of an offence and takes some part therein. He is then described as an "aider and abettor". The words "counsel and procure" are appropriate to a person who, though not present at the commission of the offence, is an accessory before the fact. That all these words may be used together to charge a person who is alleged to have participated in an offence otherwise than as a principal in the first degree was established by *In re Smith* (17). Whether where the words "counsel and procure" alone are used, there must be a proof of something more than would establish a case of being an accessory before the fact is not one which we feel necessary to decide in this case. The main point that was argued is one of general importance with regard to offences under the Licensing Acts, and as we are satisfied that the licensee cannot be convicted as a participant, to use a compendious expression, in the offence charged against the persons who consumed the intoxicating liquor, we give no decision upon it.

---

(9) [1921] 1 K. B. 509.
(10) [1940] 1 K. B. 571.
(11) [1950] W. N. 227; 66 (Pt. 1) T. L. R. 1241.
(12) [1930] 1 K. B. 211, 220.
(13) Ante 342.
(14) [1928] 1 K. B. 217, 230.
(15) [1895] 1 Q. B. 918.
(16) (1858) 3 H. & N. 227.

[His Lordship then stated the facts substantially as set out above, and continued:] The argument for the prosecutor may be summarized as follows. If the licensee had been present, or had knowledge that the customers were consuming liquor after hours, and had taken no steps to prevent the offence, she would have been aiding and abetting it. Secondly, although she herself was not present and had no knowledge, yet, as she had placed waiters in charge of the concert room and had, as it was said, delegated the management of the room to them, their knowledge was her knowledge and she was accordingly guilty of aiding and abetting.

The first thing to observe is that while s. 4 of the Licensing Act, 1921, prohibits a licensee from selling or supplying, either by himself or by his servants, intoxicating liquor outside permitted hours, and also prohibits the consumption in licensed premises of any intoxicating liquor after these hours, it does not make it an offence in the licensee to suffer or permit the consumption of liquor after hours. While it may seem curious that Parliament did not make this an offence in a licensee, nothing would be gained by discussing whether the omission appears to be deliberate or accidental. The fact remains that consuming liquor after hours is only a substantive offence in the consumer. At the same time, there can be no doubt that if a licensee consciously permits consumption after hours it would amount to aiding and abetting the offence, but we have now to consider whether, as the section does not create a substantive offence in the licensee, she can be convicted of aiding and abetting by imputing to her the knowledge of her servants. There can be no doubt that this court has more than once laid it down in clear terms that before a person can be convicted of aiding and abetting the commission of an offence, he must at least know the essential matters which constitute the offence: see, for instance, *Johnson* v. *Youden* (18). The magistrate in this case has acquitted the licensee of any knowledge of the matters which constituted the principal offence, but it is said that the cases establish that the knowledge of her servants must be imputed to her, and that there are many cases in which a licensee has been convicted although he himself did not know the facts constituting the offence is, of course, beyond question. There are certain offences under the Licensing Acts which arise because the statute imposes an absolute prohibition, for instance, the offence of selling liquor to a drunken person. In *Cundy* v. *Le Cocq* (19) it was held that the prohibition against selling to such a person imposed by s. 13 of the Licensing Act, 1872, now replaced by s. 75 of the Licensing (Consolidation) Act, 1910 (20), is absolute and that knowledge of the condition of the person served is not necessary to constitute the offence. On the other hand there are many offences in which it is necessary to show either that the licensee suffered or permitted the offence to take place, or that he knowingly permitted matters which constitute an offence. There is no material difference between permitting or suffering something and knowingly allowing it to take place, for, as was said in *Somerset* v. *Hart* (21): "How can a man suffer a thing to be done when "he does not know of it?" The difference between an absolute prohibition and a prohibition against permitting or suffering was pointed out by Collins, J., in *Somerset* v. *Wade* (22), where, under other words in the same section as was under consideration in *Cundy* v. *Le Cocq* (23) the licensee was prosecuted, not for selling to a drunken person, but for permitting drunkenness on licensed premises. As it was there proved that the licensee did not know that the person in question was drunk the court held he could not be convicted of permitting drunkenness, though they approved the decision in *Cundy* v. *Le Cocq* (24) because the prohibition against selling to a drunken person is absolute.

---

(17) 3 H. & N. 227.

---

(18) [1950] 1 K. B. 544.

(19) (1884) 13 Q. B. D. 207.

(20) Licensing (Consolidation) Act, 1910, s. 75, sub-s. 1: "The holder of "a justices' licence shall not permit "drunkenness, or any violent, quarrel-"some, or riotous conduct to take "place on his premises, or sell any "intoxicating liquor to a drunken per-"son".

Sub-section 2: "If the holder of a "justices' licence acts in contraven-"tion of this section, he shall be "liable in respect of each offence to a "fine not exceeding in the case of the "first offence ten pounds, and in the "case of any subsequent offence "twenty pounds".

Sub-section 3: "If the holder of "a justices' licence is charged with "permitting drunkenness on his pre-"mises in contravention of this sec-"tion, and it is proved that any "person was drunk on his premises, "it shall lie on the holder of the "licence to prove that he and the "persons employed by him took all "reasonable steps for preventing "drunkenness on the premises".

(21) (1884) 12 Q. B. D. 360, 362.

(22) [1894] 1 Q. B. 574.

(23) 13 Q. B. D. 207.

We now turn to the cases in which knowledge has been imputed to a licensee because of the knowledge of his manager or servant. It is unnecessary to go through them all because the principle which applies was laid down, not for the first time, in *Linnett* v. *Metropolitan Police Commissioner* (25). All the cases on the subject were quoted, and, in giving judgment, I said (26): "The principle underlying these decisions does not "depend upon the legal relationship existing between master "and servant or between principal and agent; it depends on the "fact that the person who is responsible in law, as, for example, "a licensee under the Licensing Acts, has chosen to delegate his "duties, powers and authority to another".

We will assume for the purpose of this case that the licensee had delegated to the waiters the conduct and management of the concert room, and if the Act had made it an offence for a licensee knowingly to permit liquor to be consumed after hours, then the fact that she had delegated the management and control of the concert room to the waiters would have made their knowledge her knowledge. In this case there is no substantive offence in the licensee at all. The substantive offence is committed only by the customers. She can aid and abet the customers if she knows that the customers are committing the offence, but we are not prepared to hold that knowledge can be imputed to her so as to make her, not a principal offender, but an aider and abettor. So to hold would be to establish a new principle in criminal law and one for which there is no authority. If Parliament had desired to make a licensee guilty of an offence by allowing persons to consume liquor after hours it would have been perfectly easy so to provide in the section. But a doctrine of criminal law that a licensee who has knowledge of the facts is liable as a principal in the second degree is no reason for holding that if she herself had no knowledge of the facts but that someone in her employ and to whom she may have entrusted the management of the room did know them, this makes her an aider and abettor. As no duty is imposed on her by the section to prevent the consumption of liquor after hours there was no duty in this respect that she could delegate to her employees. While it may be that the waiters could have been prosecuted for aiding and abetting the consumers, as to which we need express no opinion, we are clearly of opinion that the licensee could not be.

(24) 13 Q. B. D. 207.

(25) [1946] K. B. 290.

(26) Ibid. 294.

To hold the contrary would, in our opinion, be an unwarranted extension of the doctrine of vicarious responsibility in criminal law.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co., for O. A. Radley, Leeds; Collyer-Bristow & Co., for Alf. Masser & Co., Leeds.*

1950
Oct. 5, 6, 10, 11, 12, 16.

Sellers, J.

NALDER AND ANOTHER *v.* ILFORD CORPORATION.

Local government—Building—Works in contravention of by-laws—Notices to pull down—Validity—Premises let at rent not a rack-rent—Whether lessee "owner"—Right to apply for extension of time for compliance with notices—Whether an appeal—Notice given more than twelve months from completion of works—Notice served on one-man company—Whether served on director individually—Trespass—General damages—Public Health Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *s.* 65, *sub-ss.* 1, 3 *and* 4; *s.* 300, *sub-ss.* 1 *and* 3; *s.* 343, *sub-s.* 1—*Housing Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 188, *sub-s.* 1—*Building Restrictions* (*War-Time Contraventions*) *Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 35), *s.* 1, *sub-s.* 1; *s.* 3, *sub-s.* 1 (*a*); *s.* 7, *sub-s.* 1.

A director of a limited company let to them on monthly tenancies, at rents not being rackrents, certain premises of which the London County Council were the ground landlords. On those premises were erected, between September 3, 1939, and the end of 1946, certain works which contravened the by-laws of a local authority. By a letter dated June 14, 1946, and sent to the company, the local authority complained that works had been placed on certain premises (including the premises mentioned above) which did not comply with the by-laws, and that they proposed to enforce those by-laws. On January 17, 1947, the local authority served on the company notices under s. 65 of the Public Health Act, 1946, requiring them to pull down the works or take other appropriate action within 28 days. Those notices did not state the company's right by s. 65, sub-s. 3, to apply to a court of summary jurisdiction to extend that time. As the company failed to take action the local authority entered the premises and pulled down the works.

In an action by the director and the company against the local authority for trespass in respect of their entry on the premises and the pulling down of the works:—

Held, (1.) that, in respect of works completed after January 17, 1946, the notices of January 17, 1947, were effective under s. 65 of the Public Health Act, 1936, and that the local authority were therefore entitled to enter and pull down those works; for the notices were properly served on the company, it being the "owner" of the premises within the definition in s. 343, sub-s. 3, of that Act, and they were valid notwithstanding that the right of application for extension of time given by s. 65, sub-s. 3, was not stated in them, although s. 300, sub-s. 3, required a right of appeal to be mentioned in the notice, since that right was not a right of appeal within the meaning of s. 300, sub-s. 3; but (2.) that, in respect of works completed before January 17, 1946, those notices were invalid by s. 65, sub-s. 4, which required them to be given within twelve months of the completion of the work in question; and that the local authority were liable in damages to the company and its director in respect of those works, notwithstanding the extension of time given by the Building Restrictions (War-Time Contraventions) Act, 1946, since the local authority had not served on the director a notice required by s. 3, sub-s. 1 (*a*) of that Act to be served on every owner of the land in question, and he was an "owner" within the relevant definition (in s. 188, sub-s. 1, of the Housing Act, 1936) notwithstanding that the ground landlords were also owners within that definition, the letter of June 14, 1946 (which otherwise complied with s. 3, sub-s. 1 (*a*), notwithstanding that no formal notice was given having been sent only to the company and not to its directors; and that he in fact knew of the contents of the letter by reason of his close connexion with the company was not sufficient to cure the defect.

ACTION.

The plaintiff, Lawrence Marcus Nalder, was a director of Ilford and Dagenham Properties Ld., the plaintiff company, and he and his wife owned all but two of one hundred 1*l.* shares, the capital of the company. The plaintiff held property in Becontree Avenue, Ilford, including Nos. 153, 155 and 157, on long leases from London County Council, No. 153 at a rent of 16*l.* a year and Nos. 155 and 157 at rents of 15*l.* a year each. From July, 1944, he let those three properties to the plaintiff company on monthly tenancies by an oral agreement at rents of 62*l.* 10*s.* for No. 153 and 62*l.* for Nos. 155 and 157. The properties consisted of premises designed as shops with residential accommodation above and vacant land in the rear. On that land were erected five structures, referred to as structures Nos. 1, 2, 3, 4 and 5. Nos. 4 and 5 were erected after September 3, 1939, but before the end of 1945. Nos. 1, 2 and 3 were erected in 1946 and after January 17.

On June 14, 1946, the defendants, Ilford Corporation, sent to the plaintiff company a letter of that date referring to a considerable number of properties, including Nos. 153, 155 and 157, and stating: "It is . . . clear that many buildings and erections "have been placed on the land at the rear of the above properties "which do not comply with the council's by-laws and in many "cases without plans having been submitted, and the council "will also exercise their statutory powers to secure that these "buildings and erections shall be either pulled down or, in proper "cases, altered so as to comply with the by-laws".

On January 17, 1947, the corporation served on the company notices headed "Public Health Act, 1936", alleging that the company were erecting on No. 153, and had erected on Nos. 155 and 157, buildings which contravened their by-laws, those buildings being structures Nos. 1, 2, 3, 4 and 5. The notices required the company either to pull down or remove those structures, or, if they so elected, to effect such alterations as might be necessary to make them comply with the by-laws, within twenty-eight days from the receipt of the notices. The notices made no reference to any right of the company to apply to a court of summary jurisdiction to extend that time. The plaintiffs did nothing in compliance with those notices, and the defendants therefore entered on the premises and pulled down the structures, which were in fact in contravention of the material by-laws.

The plaintiffs brought an action for damages for trespass against the corporation on the ground that notices as required by the Public Health Act, 1936 (1), had not been served, and that the corporation were therefore not entitled to pull down the

(1) Public Health Act, 1936, s. 65, sub-s. 1: "If any work to which "building by-laws are applicable con-"travenes any of those by-laws, the "authority . . . may by notice "require the owner either to pull "down or remove the work or, if he "so elects, to effect such alterations "therein as may be necessary to "make it comply with the by-laws".

Sub-s. 3: "If a person to whom a "notice has been given under the "foregoing provisions of this section "fails to comply with the notice "before the expiration of twenty-"eight days, or such longer period as "a court of summary jurisdiction "may on his application allow, the "local authority may pull down or "remove the work in question . . .".

Sub-s. 4: "No such notice as is "mentioned in sub-s. 1 . . . of this "section shall be given after the "expiration of twelve months from "the date of the completion of the "the work in question . . .".

Section 300, sub-s. 1: "Where any "enactment in this Act provides (*a*) "for an appeal to a court of summary "jurisdiction against a requirement, "refusal or other decision of a coun-"cil; or (*b*) for any matter to be "determined by, or an application in "respect of any matter to be made "to, a court of summary jurisdiction, "the procedure shall be by way of "complaint for an order . . .".

Sub-s. 3: "In any case where such "an appeal lies, the document notify-"ing to the person concerned the "decision of the council in the matter "shall state the right of appeal to a "court of summary jurisdiction . . .".

Section 343, sub-s. 1: "In this "Act, unless the context otherwise "requires, the following expressions "have the meanings hereby assigned "to them— . . . 'owner' means the "person for the time being receiving "the rackrent of the premises in "connexion with which the word is "used, whether on his own account "or as agent or trustee for any other "person, or who would so receive the "same if those premises were let at "a rackrent; . . . 'rackrent' in rela-"tion to any property means a rent "which is not less than two-thirds "of the rent at which the property "might reasonably be expected to let "from year to year" subject to certain adjustments.

structures. The corporation relied on that Act and on the Building Restrictions (War-Time Contraventions) Act, 1946 (2).

W. G. Wingate and *Peter Dow* for the plaintiffs.

Basil Nield, K.C., Garth Moore and *J. R. Macgregor* for the defendant corporation.

Cur. adv. vult.

Oct. 16. SELLERS, J., delivered the following judgment:—The plaintiffs allege that the demolition of the structures by the corporation was unlawful, and claim damages for trespass. By their defence the corporation admit that they entered on the premises and carried out the demolitions, but they deny that they acted illegally or trespassed, and allege that they acted under powers conferred on them by s. 65 of the Public Health Act, 1936.

Section 65, sub-s. 4, of the Public Health Act, 1936, provides that no notice under that section "shall be given after the "expiration of twelve months from the date of the completion "of the work in question". The notices in respect of structures Nos. 4 and 5, which were erected before the end of 1945, were therefore out of time, but the defendant corporation seek to rely on the Building Restrictions (War-Time Contraventions) Act, 1946, for an extension of the time, which contention I shall consider later.

I deal next with the issue whether the notices were rightly served on the plaintiff company. Section 65, sub-s. 1, of the Act requires the owner to be given notice "either to pull down

---

(2) Building Restrictions (War-Time Contraventions) Act, 1946, s. 1, sub-s. 1: "Where during the period "beginning with September 3, 1939, "and ending with [March 26, 1946] "(in this Act referred to as the 'war "'period') works on land have been "carried out which do not comply "with a building law, any period of "time limiting the taking of steps "for enforcing the law shall be cal"culated without regard to time "elapsing during the war period "...".

Section 3, sub-s. 1: "Where dur"ing the period of five years begin"ning with the end of the war period "any person proposes to take "steps for enforcing a building law ". . . in the case of works on land "not complying with the law . . . "in question carried out during the "war period . . . then (*a*) . . . he "shall serve on every owner and "occupier of the land not less than "twenty-eight days' notice of the pro"posal . . .".

Section 7, sub-s. 1: "owner" has the same meaning as in the Housing Act, 1936.

Housing Act, 1936, s. 188, sub-s. 1: ". . . 'Owner', in relation to any "building or land, means a person ". . . who is for the time being "entitled to dispose of the fee simple "of the building or land, whether in "possession or in reversion, and "includes also a person holding or "entitled to the rents and profits of "the building or land under a lease "or agreement, the unexpired term "whereof exceeds three years . . .".

"or to remove the work or, if he so elects, to effect such alterations therein as may be necessary to make it comply with the "by-laws". The word "owner" is defined in s. 343, sub-s. 1, of the Act by reference to the receipt of rackrent. I accept the evidence of a valuer called by the defendant corporation that 62*l.* and 62*l.* 10*s.* are rents which are not rackrents. The plaintiff Nalder, therefore, was not the "owner" within the meaning of the Public Health Act. I find that the plaintiff company would be the person who would receive the rackrent if the premises were let at a rackrent.

Various cases were cited, but the circumstances were different in each case, and I need only mention them. The defendant corporation placed reliance for that submission, which I accept, on *Bowditch* v. *Wakefield Local Board* (3). A further case, *Truman, Hanbury, Buxton & Co. Ld.* v. *Kerslake* (4), was cited. Kennedy, J., in giving the judgment of a Divisional Court in that case, said (5): "It appears to us to be impossible to treat as the "person who would receive the rackrent, if the premises were "let at a rackrent, persons who, at the time when the 'owner' "of premises, as defined by s. 141 [of the Public Health (London) "Act, 1891, which is now reproduced as regards the definition "of the word 'owner' by s. 343 of the Public Health Act, 1936,] "has to be found, have not such an interest in the property that, "if it was let at a rackrent, they would receive such rackrent. "The words of the section in our judgment, in the case of there "being no one who in fact receives a rackrent from the actual "occupier, designate as 'owner' the person who 'rebus sic stanti-"'bus', that is to say, with the interests in the premises as they "then are, would, if they were let to an occupier at a rackrent, "receive that rackrent. In this case, whilst the sublease to "Aslett subsists, that is to say, for the next thirty-and-a-half "years and until a date only eleven days anterior to the expiring "of the appellants' own interests, the appellants could not let "to anyone. The only person who could let the premises at a "rackrent, the only person whose interest in the premises places "him in a position to receive a rackrent, is Bishop, the assignee "of the sublease to Aslett. His interest as assignee of that "sublease gives him the power of so letting; and if the premises "were so let, he is the person who would receive the rackrent. "He chooses, it is true, to occupy the premises himself; but we "see nothing to prevent the same person being both occupier of "the premises and the 'owner' within the meaning of this "section. The cases referred to in the course of the argument "before us, *Bowditch* v. *Wakefield Local Board* (3) and *Wright* "v. *Ingle* (6), in which questions as to the meaning of the term

(3) (1871) L. R. 6 Q. B. 567.
(4) [1894] 2 Q. B. 774.
(5) Ibid. 778.
(6) (1885) 16 Q. B. D. 379.

" 'owner' in similar provisions of the Public Health Act, 1848, " and the Metropolis Local Management Act, 1855, are raised, " are not decisions directly in point; but there are passages in " some of the judgments in those cases which appear to us, to " some extent at least, to support the conclusion to which we " have come in this case ".

I think that those cases and the judgment which I have just read support the conclusion at which I have arrived. In this case reliance was placed strongly on behalf of the plaintiffs on *Kensington Borough Council* v. *Allen* (7), but I think the complete answer to reliance on that decision is that there there was in fact a rackrent being paid, and that case, therefore, is not in point. On the evidence which I have accepted from the valuer there was no rackrent being paid, and I have come to the conclusion, as I said, that the company would be the person to receive the rackrent if there was one, and therefore I hold that the company were rightly served.

It was further submitted that the notices were invalid because they did not comply with s. 300, sub-s. 3, of the Public Health Act, 1936, which provides that where the Act gives a right of appeal to a court of summary jurisdiction against a requirement of a council the notice in question shall state the right of appeal. The notices in this case did not make any such reference to a right of appeal. It is contended on behalf of the plaintiffs that under s. 65, sub-s. 3, there was such a right and that therefore the notices were invalid because they failed to include a statement in regard to it. It is contended (and I think rightly contended) that that sub-section gives the right to a person so situated to apply to a court of summary jurisdiction to extend the time, and it is argued that such an application is a right of appeal which should have been stated on the notice.

It is to be observed that s. 300, sub-s. 1, speaks of " appeal " and " application ", and yet sub-s. 3 refers only to appeals; that is to say it would appear to refer to sub-s. 1 (*a*) but not expressly to sub-s. 1 (*b*). It is clear that if a statute, even if only by stipulating a form to be used, requires such a right of appeal to be stated in a notice, it will be invalid if such statement is omitted. *Rayner* v. *Stepney Corporation* (8) is a case where part of a form was omitted. But in *Arlidge* v. *Tottenham Urban District Council* (9) it was held that the notice served by a local authority in that case under s. 28 of the Housing, Town Planning, etc., Act, 1919, was not rendered invalid because it omitted to state that the owner had the right of appeal mentioned in one of the sections of an Act which was applicable, and *Rayner* v. *Stepney Corporation* (8) was distinguished. It appears that,

(7) [1926] 1 K. B. 576.
(8) [1911] 2 Ch. 312.
(9) [1922] 2 K. B. 719.

apart from a statutory obligation, notwithstanding the desirability of inserting this information, it does not invalidate a notice if a right such as is given here is omitted; and I do not find in the Public Health Act, 1936, an express provision that an application to extend time has to be notified to a person concerned. Such an application is not rightly described as an appeal, and where the statute uses in the same section the words "appeal" and "application" I see no reason for giving them both the same meaning.

For the reasons I have given, therefore, I find that the notices in respect of structures Nos. 1, 2 and 3 were valid and in accordance with the defendant corporation's statutory powers, and that they provide a complete answer to the plaintiffs' claim relating to those buildings.

I turn now to consider structures Nos. 4 and 5, which were not erected within twelve months of the service of the respective notices. The Building Restrictions (War-Time Contraventions) Act, 1946, provides that where during the war period—which is the period from September 3, 1939, to March 26, 1946—works on land have been carried out which do not comply with a building law, any period of time limiting the taking of steps for enforcing the law shall be calculated without regard to time elapsing during the war period.

Since structures Nos. 4 and 5 were erected during the war period that Act applies to them. Either of the plaintiffs might have made an application under s. 2 of that Act for a determination under that section with respect to those structures. As they did not the defendant corporation were entitled to enforce the by-laws affecting them after serving a notice on the plaintiffs under s. 3, sub-s. 1 (*a*). But it is urged on behalf of the plaintiffs (1.) that the corporation failed to serve any notice under that provision or, alternatively (2.), even if they had served a notice, it was not served on the "owner" as that provision requires, that they were not therefore entitled to rely on that Act, and consequently that they have not shown that their entry on to these premises and their demolition was sanctioned by statute and was legal and valid.

The defendant corporation rely on the letter of June 14, 1946, which was sent by them to the plaintiff company. The letter concerned a number of matters. It was headed with reference to a considerable number of different properties in which Nos. 153, 155 and 157 were included. I find that that letter is adequate notice though it is an informal and perhaps fortuitous fulfilment of the requirements stating the corporation's intentions under the Act of 1946. The letter has been contrasted with a formal notice that was put in which no doubt would have been served if the defendant corporation had accepted the position or recognized the position that some of the works carried out on these properties were properly described as works carried out in the war period. On the evidence which they had (and which they thought accurate) the corporation took the erroneous view that they had been erected after the war period. Nevertheless, although no formal notice was given, as I read this letter I think it sufficiently complies with the requirements by indicating in its terms the course which the council proposed to take. There is no form specified in the Act of 1946, and the letter in my view is sufficient.

The second question which arises is whether that notice of proposal has been served in accordance with the requirements of the Act. The letter was addressed to the plaintiff company, and the relation of the plaintiff Nalder to that company was a close one. The plaintiff Nalder was a director of the company, and I think at one time he signed letters as assistant secretary. It may well be (and the probability is) that he was well informed of all the activities of that company and received this letter, which came by registered post, or read it shortly after it was received by the plaintiff company.

But s. 3, sub-s. 1 (*a*), of the Act of 1946 requires that this notice of proposal, as it has been conveniently called, shall be served "on every owner and occupier of the land". The word "owner" there has the same meaning by s. 7, sub-s. 1, of that Act as it has in the Housing Act, 1936.

[His Lordship read the definition of "owner" in s. 188, sub-s. 1, of that Act, and continued:] The person or authority which is entitled to dispose of the fee simple of the building or land is the London County Council, and under that definition, as I see it, they are the "owner". But the definition includes also "a person holding or entitled to the rents and profits of "the building or land under lease or agreement, the unexpired "term whereof exceeds three years". That would appear to cover the plaintiff Nalder; and if the definition visualizes, as it seems to do, two owners, then he is to be regarded as an owner; and I have come to the conclusion, though not without some doubt, that I should so regard him. There are here under this definition two owners, and the plaintiff Nalder is included as owner as well as the London County Council who are entitled to dispose of the fee simple. In those circumstances, if that be right, s, 3, sub-s. 1, of the Act of 1946 requires that a notice should be served on him in that capacity.

Notice served on the limited company, notwithstanding the plaintiff Nalder's close relationship to that company, and the other observations which I have made about his knowledge of the matter, is not in fact a notice served on him; and where trespass is alleged and statutory authority is relied on the court must see that the requirements of the statute are fully and completely fulfilled because such acts, without authority, are an intrusion of the rights of the citizen. I must reject the suggestion that because I could make a finding of fact (as I think I could) that the plaintiff Nalder knew of the contents of this notice and knew precisely as much as the limited company knew, the notice which the Act of 1946 requires had been served on him. That being so it seems to me that there has been a failure on the part of the defendant corporation in that one particular.

The question of damages then arises. It is said, rightly, that the company has the right to immediate possession of the buildings in question, and therefore is entitled to sue and recover damages for trespass, and that the plaintiff Nalder is entitled to damages for the injury to the reversion. The way in which the damages are framed is, I think, erroneous. It has been claimed in this action that the plaintiffs or one or other of them or both of them should have the cost of reinstating the structures, but I think that that is not the right measure of damage. Indeed it would be a curious position if it were so, because I am satisfied that the condition in which these two structures were was an infringement of the by-laws, and it would be wrong to assess the damages as the cost of putting up once again a structure which would rightly be the subject-matter of complaint. The true assessment of damage in this case, I think, would be based on the injury to the reversion or the diminution in value of the land, and of that I have no evidence.

Another factor which bears on any claim for special damage is that notwithstanding that I have found that, by this omission to serve the plaintiff Nalder, the notice of June 14, 1946, was invalid and inoperative, the premises nevertheless were at any time within a period of five years likely to be dealt with properly by the local authority, and the tenure of the company of those premises might have been very short. I think that on the evidence as it stands and the complete lack of any basis on which I can assess any special damage in this case I should not give any special damage at all. I think that none has been proved to my satisfaction.

But, this being a case of trespass, general damages flow; although it is, in a sense, a technical trespass. I appreciate the intrusion on the rights of the plaintiffs; and that must not be permitted without full legal sanction and everything having been done which ought to have been done. Nevertheless I think that the plaintiff Nalder and the company were knowingly, though perhaps in war-time desirably, flouting the building by-laws. When the war was over I think that the plaintiffs' attitude was not helpful in this matter and that the buildings were legitimately the cause of complaint by the corporation. In the circumstances

1950

NALDER AND ANOTHER v. ILFORD CORPORATION.

I think that the right damages to award would be the sum of 25*l.* to each of the plaintiffs by way of general damages for the wrong which the defendant corporation by the omission which I have indicated have committed, and there will be judgment accordingly.

Judgment accordingly.

Solicitors: *Bolton, Jobson & Yate-Lee; K. F. B. Nicholls.*

R. P. C.

END OF VOL. I.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1951, will be as follows:—

In the First Series,
[1951] Ch.
In the Second Series,
[1951] 1 K. B. [1951] 2 K. B. [1951] P.
In the Third Series,
[1951] A. C.

INDEX

AGRICULTURAL HOLDING. *See* Landlord and Tenant.

APPEAL. *See* Summary Jurisdiction.

2. —— from Metropolitan Magistrate. *See* Procedure.

BAILMENT. *See* Criminal Law—Larceny.

BASTARDY—*Affiliation order—Child born abroad—Foreign mother domiciled abroad—Jurisdiction of justices — Bastardy Laws Amendment Act*, 1872 (35 *&* 36 *Vict. c.* 65), *ss.* 3, 4.
O'Dea *v.* Tetau - - - **Divl. Ct. 184**

BILL OF LADING. *See* Shipping.

CERTIORARI—*Extent of remedy—Whether confined to matters of jurisdiction—Inferior tribunal—Order bad in law on its face—"Speaking order"—Court's jurisdiction to interfere.*
Rex *v.* Northumberland Compensation Appeal Tribunal; *Ex parte* Shaw
Divl. Ct. 711

CHILDREN *and Young Persons—Juvenile court—Girl under seventeen years sent to approved school—Appeal to quarter sessions—Girl then over seventeen years—Jurisdiction—Children and Young Persons Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 12), *ss.* 61, 62—*Summary Jurisdiction (Appeals) Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 38), *s.* 1.
Drover *v.* Rugman - - **Divl. Ct. 380**

CONTRACT—*Commission—"On turnover of "the company's annual business"—Meaning of turnover—Whether lump-sum payments under settlements of war-time contracts included.*
Aris-Bainbridge *v.* Turner Manufacturing Co. Ld. - - - - **McNair, J. 563**

2. —— *Master and Servant—Wrongful dismissal—Measure of damages—Commercial Traveller—Remuneration by salary and commission—Whether entitled to commission on orders executed after termination of employment.*
Sellers *v.* London Counties Newspapers
C. A. 784

CONTRACT—*continued.*

3. —— *Negligence—Dress left for cleaning—Damage—Conditions on receipt exempting cleaners from liability for damage however caused—Receipt signed by plaintiff—Innocent misrepresentation by shop assistant.*
Curtis *v.* Chemical Cleaning and Dyeing Co. - - - - - - **C. A. 805**

4. —— *Supply of newsreel films—Frustration—No frustrating event—Uncontemplated turn of events—Contract terminated.*
British Movietonews Ld. *v.* London and District Cinemas Ld. - - **C. A. 190**

5. —— *See* Local Government; Railway.

COSTS—*Legal aid—Order in favour of assisted plaintiff—Principle applicable—Legal Aid and Advice Act*, 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *s.* 1, *sub-s.* 7 (*b*); *s.* 2, *sub-s.* 2; *s.* 6, *sub-ss.* 5, 6 *and* 9.
Daley *v.* Diggers Ld. - **Hilbery, J. 661**

CRIMINAL LAW—*Bail—Conviction by court of summary jurisdiction—Committal in custody to quarter sessions for sentence—Appeal against conviction—Jurisdiction of High Court to admit to bail—Criminal Justice Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 29, *sub-s.* 1, *and s.* 37, *sub-s.* 1 (*a*).
In re Whitehouse - - **Divl. Ct. 673**

2. —— *Conspiracy — Common-law misdemeanor—Limitation of sentence—Jurisdiction of Judge—Magna Carta*, 1215, *c.* 20—*Bill of Rights*, 1688—(1 *Will. &* *Mary, sess.* 2, *c.* 2)—*Customs Consolidation Act*, 1876 (39 *&* 40 *Vict. c.* 36)—*Penal Servitude Act*, 1891 (54 *&* 55 *Vict. c.* 69), *s.* 1, *sub-s.* 2—*Penal Servitude Act*, 1926 (16 *&* 17 *Geo.* 5, *c.* 58), *s.* 1, *sub-s.* 1—*Finance Act*, 1935 (25 *&* 26 *Geo.* 5, *c.* 24), *s.* 15—*Criminal Justice Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 58).
Rex *v.* Morris - - - **C. C. A. 394**

3. —— *Corrective training — Procedure — Plea of guilty at petty sessions—Committal to quarter sessions for sentence—Notice of previous convictions served on day of summary proceedings—Sentence of corrective training—Regularity—Criminal Justice Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 23, *sub-s.* 1; *s.* 29, *sub-ss.* 1, 3.
Rex *v.* Grant - - - - **C. C. A. 500**

CRIMINAL LAW—*continued.*

4. —— *Knowingly harbouring uncustomed goods—Burden of proof—Customs Consolidation Act*, 1876 (39 *&* 40 *Vict. c.* 36), *ss.* 186, 259.
REX *v.* COHEN - - - - **C. C. A. 505**

5. —— *Larceny—Bailment of clock as security for debt of owner—Fraudulent re-taking by owner—Larceny Act*, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *ss.* 2, 1, *sub-s.* 2 (iii).
ROSE *v.* MATT - - - - **Divl. Ct. 810**

6. —— *Loitering with intent—Proof of intent—Known character of accused—Conditional discharge for previous offence—Not to be deemed a conviction—Inadmissibility of such conviction as proof of character—Admission in court of previous offence by accused—Evidence of person hearing admission receivable as evidence of character—Vagrancy Act*, 1824 (5 *Geo.* 4, *c.* 83), *s.* 4—*Prevention of Crimes Act*, 1871 (34 *&* 35 *Vict. c.* 112), *s.* 15—*Firearms Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 12), *s.* 23, *sub-s.* 2—*Criminal Justice Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 12.
REX *v.* HARRIS - - - **C. C. A. 107**

7. —— *Plea of not guilty—Plea of guilty substituted after accused man put in charge of jury—Jury not asked to return a verdict—Trial a nullity.*
REX *v.* HEYES - - - **C. C. A. 29**

8. —— *Procedure—Confession—Ruling on admissibility—Right of accused person to cross-examine witness for prosecution in presence of jury as to method of obtaining confession.*
Sentence—Corrective training—Cogency of Prison Commisioners' Report.
REX *v.* MURRAY - - **C. C. A. 391**

9. —— *Procedure — Indictment — Amendment — Indictment "defective" — Error in description—Charges of obtaining money by false pretences—Cheques obtained—Jurisdiction to order amendment—Duty of counsel for prosecution—Indictments Act*, 1915 (5 *&* 6 *Geo.* 5, *c.* 90), *s.* 5, *sub-s.* 1.
REX *v.* POPLE - - - - **C. C. A. 53**

10. —— *Sentence — Corrective training — Consecutive sentences—Validity.*
REX *v.* ALBURY - - - **C. C. A. 680**

11. —— *Sentence — Probation order — Fine not to be imposed on making of probation order —Criminal Justice Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 3, *sub-s.* 1; *s.* 11, *sub-s.* 2; *s.* 13.
REX *v.* PARRY - - - **C. C. A. 590**

12. —— "*. . . shall not as a condition of the grant . . . of a tenancy . . . require . . . "any premium"—Rent collector employed by manager of block of flats—Delegated authority to let flat—Acceptance of premium as condition of granting lease — Whether within general scope of employment—No proof of manager's knowledge — Criminal liability — Landlord and Tenant (Rent Control) Act*, 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 2, *sub-s.* 1.
BARKER *v.* LEVINSON - - **Divl. Ct. 342**

CUSTOMS AND EXCISE—*Export of prohibited goods without licence—Prohibited goods brought to "any quay or other place" for purpose of being exported—Construction—"Other place" not ejusdem generis with "quay"—Import, Export and Customs Powers (Defence) Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 69), *s.* 3, *sub-s.* 1—*Export of Goods (Control) (Consolidation) Order*, 1949, *S.I.* 1949, *No.* 2466.
ROE *v.* HEMMINGS - - - **Divl. Ct. 676**

2. ——. *See* CRIMINAL LAW.

DAMAGES—*Measure of—Sale of goods—Resale—Series of contracts—Foreseeable consequence of breach of contract—Compromise of other proceedings by plaintiffs—Vendor's liability to plaintiffs—Warranties added to successive contracts—Liability of original vendor.*
BIGGIN & CO. LD. *v.* PERMANITE LD., BERRY WIGGINS & CO. LD. (Third Parties) - -
Devlin, J. 422

2. —— Trespass. *See* LOCAL GOVERNMENT.

DEFAMATION—*Alleged libel—Defence of fair comment—Plaintiff's reply of "express "malice"—Interrogatories as to defendant's sources of information or grounds of belief—R. S. C., Ord.* 31, *r.* 1A.
ADAMS *v.* SUNDAY PICTORIAL NEWSPAPERS (1920) LD. AND CHAMPION - - **C. A. 354**

2. —— *Procedure — Alleged libel — Fair comment on a matter of public interest pleaded — No rolled-up plea — Particulars ordered stating all the facts on which comment based.*
CUNNINGHAM-HOWIE *v.* F. W. DIMBLEBY & SONS LD. - - - - - - **C. A. 360**

3. ——. *See* FRIENDLY SOCIETY.

DISCOVERY. *See* PROCEDURE.

EMERGENCY LEGISLATION—*Extraterritorial operation—War injury—Landing on foreign airfield of aircraft belonging to His Majesty—Subsequent fire—Injury to passenger in aircraft—Whether "war injury"—Whether injury "caused" by impact—Relevant enactment not expressed to have extraterritorial operation—Applicability of schemes made under it to persons injured abroad—Conflict of laws—Tort in India—Whether actionable if committed in England—Personal Injuries (Emergency Provisions) Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 82), *s.* 3, *sub-s.* 1; *s.* 8, *sub-s.* 1 —*Personal Injuries (Civilians) Scheme*, 1939 (*St. R. & O.* 1939, *No.* 1143), *art.* 27, *para.* 2.
HOWGATE *v.* BAGNALL - - **Barry, J. 265**

EXECUTION—*Sheriff's seizure of plaintiff's vessel in possession of execution debtor—Sale of vessel by sheriff, without claim having been made to it—Title of purchaser—Bankruptcy and Deeds of Arrangement Act*, 1913 (3 *&* 4 *Geo.* 5, *c.* 34), *s.* 15.
CURTIS *v.* MALONEY - - **C. A. 736**

FACTOR. *See* PRINCIPAL AND AGENT.

FACTORY — *Fatal accident — Negligence— Chains, ropes and lifting tackle—"No . . . lifting tackle shall be used unless it is of "good construction, sound material, adequate "strength, and free from patent defect"— Construction—Factories Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 23, *sub-s.* 1 (*a*).
BEADSLEY *v.* UNITED STEEL COMPANIES LD. **C. A. 408**

2. —— *Transmission machinery—"Securely "fenced"—Meaning—Test of foreseeability— Factories Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 13, *sub-s.* 1.
BURNS *v.* JOSEPH TERRY & SONS LD. - **C. A. 454**

3. —— *Workman's fall in passage leading to canteen—Patch of greasy substance on floor —Duty to "maintain" passages—Extent— Liability of employers—Factories Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 25, *sub-s.* 1, *s.* 26, *sub-s.* 1.
DAVIES *v.* DE HAVILLAND AIRCRAFT CO. LD. **Somervell, L.J. 50**

4. ——. *See* MASTER AND SERVANT.

FOOD AND DRUGS—*Information—Alleged sale of milk "not of the nature, substance and "quality" demanded — Duplicity — Separate informations desirable—Defendant retailer's information against wholesaler—Proof of wholesaler's default necessary to defence— Summary Jurisdiction Act*, 1848 (11 *&* 12 *Vict.* *c.* 43), *s.* 10—*Food and Drugs Act*, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *s.* 3, *sub-s.* 1, *s.* 83.
MOORE *v.* RAY - - - **Divl. Ct. 98**

2. —— *Milk — Adulteration — Excess of water—Effect of analyst's certificate—Analyst not required by defence to be called—Evidence in explanation—Food and Drugs Act*, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *s.* 81, *sub-s.* 1.
PRESTON *v.* FENNELL - - **Divl. Ct. 16**

FRIENDLY SOCIETY — *Action for libel against trustees—Against whom must action be brought—Friendly Societies Act*, 1896 (59 *&* 60 *Vict.* *c.* 25), *s.* 94, *sub-s.* 1.
Defamation — Libel—Privilege—Defendants trustees—Malice of one—Effect on defence of others—No liability as trustees of friendly society.
LONGDON-GRIFFITHS *v.* SMITH - - **Slade, J. 295**

GAMING AND WAGERING—*Bets on horse-racing—Money lent to loser to pay losses— Contractual obligation so to use money lent —Gaming Act*, 1892 (55 *&* 56 *Vict.* *c.* 9), *s.* 1.
MACDONALD *v.* GREEN - - **C. A. 594**

GAS NATIONALIZATION—*Plaintiff's agreement with gas company for annuity— Disclaimer by Area Gas Board—Reference to Gas Arbitration Tribunal—Notice of disclaimer revoked—Action by plaintiff against board under agreement for annuity—Jurisdiction of High Court—Gas Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 67), *ss.* 22 and 36.
O'MEARA *v.* SOUTH-EASTERN GAS BOARD **C. A. 307**

GOLD. *See* PLATE.

HIGHWAY. *See* NEGLIGENCE.

2. —— Horse. *See* NEGLIGENCE.

HIRE-PURCHASE — *Guarantee — Motor-car —Dealer's guarantee to finance company of hirer's payments—Provision that guarantee not to be avoided by company's giving time to hirer — Proviso that dealer be informed when instalment more than thirty days "overdue"—Extension of time for payment granted by company to hirer—When dealer to be informed—"Overdue"—Meaning.*
MIDLAND COUNTIES MOTOR FINANCE CO. LD. *v.* SLADE - - - - - **C. A. 346**

INFANTS—*Custody—Application by mother —Mother and father resident in different counties—Infant in Northern Ireland—What court of summary jurisdiction competent— Jurisdiction of court where child outside jurisdiction—Guardianship of Infants Act*, 1886 (49 *&* 50 *Vict.* *c.* 27), *ss.* 5, 9—*Guardianship of Infants Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 45), *s.* 7, *sub-s.* 1.
REX *v.* SANDBACH JUSTICES; *Ex parte* SMITH **Divl. Ct. 62**

INNKEEPER — *Common inn — Liability of innkeeper for loss of motor car stolen from car park—Owner of car a local resident calling at inn for liquid refreshment only—Traveller— Guest—Whether car park within hospitium of inn.*
WILLIAMS *v.* LINNITT - - **C. A. 565**

INSURANCE. *See* ROAD TRAFFIC.

INTERNATIONAL LAW—*Polish Government in London from* 1940 *to* 1945—*New Polish Government constituted at Lublin on June* 28, 1945—*Recognition of new Polish Government by British Government as from midnight July* 5–6, 1945—*Terms of certificate of recognition—Retroactivity—No de facto control over Polish ships and men in England by new Polish Government.*
BOGUSLAWSKI *v.* GDYNIA-AMERYKA LINIE **C. A. 162**

JUSTICES—Jurisdiction. *See* Bastardy.

LANDLORD AND TENANT — *Agreement "not to sublet"—Construction—Subletting part of premises—Whether breach.*
Cook *v.* Shoesmith - - **C. A. 752**

2. —— *Agricultural holding—Lease of three cottages with agricultural land—Tenancy from year to year with provision for six months' notice to quit—Cottages sub-let to persons not engaged in agriculture — Twelve months' notice to quit cottages and land served by landlord under Agricultural Holdings Act—Notice held inoperative by Agricultural Land Tribunal — Whether notice invalidated in respect of cottages—Severance of agricultural land from non-agricultural land not effected by Agricultural Holdings Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 1, *sub-s.* 1.
Howkins *v.* Jardine - - **C. A. 614**

3. —— *Agricultural holding—Notice to quit given before March* 1, 1948 — *Consent of Minister not obtained—Order requiring consent of Minister revoked before expiration of notice—Validity of notice—"Null and void"—Meaning—Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63), *s.* 38, *sub-s.* 2—*Defence (General) Regulations,* 1939 (*St. R. & O.* 1941, *Nos.* 1774 *and* 2052, 1943, *No.* 200), *reg.* 62, *para.* 4a, *reg.* 99b—*Defence Regulations* (*No.* 3), 1948 (*S.I.* 1948, *No.* 336).
Boddington *v.* Wisson - **C. A. 606**

4. —— *Agricultural holding—Yearly tenancy—Farm occupied by tenant and family and managed by son—Death of tenant intestate—Landlord not informed of intestacy—Son and daughter remaining in occupation of farm—Notice to quit addressed to executors of deceased tenant at farm—Validity—Agricultural Holdings Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 92, *sub-s.* 3.
Egerton *v.* Rutter - - - -
Lord Goddard, C.J. 472

5. —— *Application for new tenancy—"Within two months after service of notice"—Construction—Landlord and Tenant Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *ss.* 4, 5, *sub-ss.* 1, 2.
Kerridge *v.* Lamdin - - **C. A. 478**

6. —— *Construction—Lease for twenty-one years determinable by lessors at end of fourteen years—"If they shall require the premises for the purposes of the business carried on by them"—Part only required at then undetermined time during next seven years.*
Parkinson *v.* Barclays Bank Ld.
C. A. 368

7. —— *Cottage let at rent—Subsequent arrangement for tenant to remain on till his death without paying rent — Daughter as administratrix claiming benefit of original contractual tenancy—Surrender by operation of law—No continuing tenancy under the Rent Restriction Acts.*
Foster *v.* Robinson - - **C. A. 149**

8. —— *Death of statutory tenant — First cousins resident with tenant for many years—Claim to succeed to tenancy as members "of the tenant's family"—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*g*)—*Increase of Rent and Mortgage Interest (Restrictions) Act,* 1935 (25 *Geo.* 5, *c.* 13), *s.* 1.
Langdon *v.* Horton - - **C. A. 666**

9. —— *Lease — Construction — Premium — Legal requirement by landlords in* 1948 *of a premium for grant of fourteen years' lease—Covenant by lessee for payment of premium—Premium payable by instalments over ten years—Proviso for re-entry for breach of covenant—Demand by landlord for payment of instalment after the passing of the Landlord and Tenant (Rent Control) Act,* 1949—*Whether a requirement as a condition of "the continuance" of a tenancy—Whether a demand for increased rent—Landlord and Tenant (Rent Control) Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 2, *sub-ss.* 1, 5 *and* 7.
Regor Estates Ld. *v.* Wright **C. A. 689**

10. —— *Lease — Encroachment — Tenant's occupation of landlord's land adjoining demised premises—Occupation as tenant with acquiescence of landlord—Tenant's liability for repairs in respect of adjoining land.*
Perrott (J. F.) & Co. Ld. *v.* Cohen
C. A. 705

11. —— *Monthly tenancy—Notice to quit—Assignment of property before termination of notice to quit—Failure to obtain landlord's leave to assign—Leave not required by tenancy agreement—Right to recover possession—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *Sch. I, para.* (*d*).
Regional Properties Co. Ld. *v.* Frankenschwerth and Chapman - - **C. A. 631**

12. —— *Notice to quit—Dispute whether tenancy weekly or yearly—Notice to quit purporting to terminate either—Validity.*
Chez Auguste Ld. *v.* Cottat
Lord Goddard, C.J. 292

13. —— *Proceedings by tenant pending before rent tribunal—Notice to quit served before decision—Effect—Furnished Houses (Rent Control) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 5.
Alexander *v.* Springate
Streatfeild, J. 803

LANDLORD AND TENANT—*continued.*

14. —— *Rent control—Reference of tenancy agreement to rent tribunal—Application for reduction of rent—Dispute as to existence of tenancy at time of reference—Fact collateral to specific jurisdiction—Power of tribunal to decide—Furnished Houses (Rent Control) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 2, *sub-s.* 1—*Landlord and Tenant (Rent Control) Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 1, *sub-s.* 1.
REX *v.* LONDON, ETC., RENT TRIBUNAL; *Ex parte* HONIG - - - - **Divl. Ct. 641**

15. —— *Rent control—Unfurnished dwelling-house—Application to tribunal to determine reasonable rent—Agreement as to rent reached before decision of tribunal—Notification sent to tribunal—Right of applicant to withdraw application—Landlord and Tenant (Rent Control) Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 1.
REX *v.* HAMPSTEAD AND ST. PANCRAS RENT TRIBUNAL; *Ex parte* GOODMAN - **Divl. Ct. 541**

16. —— *Rent restriction—Death of tenant—Wife not living with him at death—Whether member of tenant's family residing with him entitled to protection—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 *(g).*
TINKHAM *v.* PERRY - - **C. A. 547**

17. —— *Rent restriction—Lease of shop and dwelling-house—Determination of contractual tenancy—Tenant in possession of shop only—Dwelling-house sublet—Whether tenant protected—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15, *sub-s.* 1.
JOHN M. BROWN LD. *v.* BESTWICK **C. A. 21**

18. —— *Rent restriction—Order for possession against statutory tenant—Suspension of execution of order—Death of tenant before order executed—Landlord's right to possession as against tenant's daughter — Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17) *s.* 5, *sub-s.* 2; *s.* 12, *sub-s.* 1 *(g).*
AMERICAN ECONOMIC LAUNDRY LD. *v.* LITTLE **C. A. 400**

19. —— *Rent restriction—Reasonable rent of flat determined by rent tribunal—Jurisdiction—Rateable value of flat on appropriate day—House converted into flats—No apportionment of rateable value made—Flat separately assessed at rateable value exceeding statutory limit—Rateable value of whole house below statutory limit—Power of county court judge to apportion rateable value of house converted into flats—Whether new entity created—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 3—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 7, *sub-ss.* 2 *and* 3—*Landlord and Tenant (Rent Control) Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 1, *sub-s.* 1.
REX *v.* SIDMOUTH RENT TRIBUNAL; *Ex parte* SELLEK - - - - - **Divl. Ct. 778**

20. —— *Rent restriction—Standard rent—Furnished letting—Purchase of furniture by tenant—No surrender of tenancy or variation of rent—Subsequent vacating of premises by tenant and unfurnished letting to plaintiff—First letting under Rent Acts—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 —*Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 10, *sub-s.* 1 *(as amended)—Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 2.
STAGG *v.* BRICKETT - - **C. A. 648**

21. —— *Rent restriction—Standard rent—Rent including rates—Increase of rates resulting in corresponding increase in rent—Whether "permitted increases"—Standard rent not exceeded—Whether statutory tenancy created —Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-s.* 1 *(b)*, *s.* 3, *sub-s.* 2.
MILLS *v.* BRYCE - - - **C. A. 757**

22. —— *Rent restriction—Sub-letting with sharing agreement—Sub-tenant's limited protection—Premises vacated by tenant—Position of sub-tenant—Furnished Houses (Rent Control) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 34)—*Landlord and Tenant (Rent Control) Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *ss.* 7, 9.
SHACKLETON *v.* GREENHALGH - **C. A. 725**

23. —— *Rent restriction — Tenancy conditional on tenant's remaining in employment of third party—Whether an "obligation of the "tenancy"—Breach of condition—Right of landlord to recover possession—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *Sch. I, para. (a).*
R. M. R. HOUSING SOCIETY LD. *v.* COMBS **C. A. 486**

24. —— *Rent restriction—Tenant permitting premises to be used for immoral purposes—Discretion of court to grant landlord possession —Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 5, *sub-s.* 2, *as substituted by Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 4—*Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *Sch. I, para. (b).*
YATES *v.* MORRIS - - - - **C. A. 77**

See also CRIMINAL LAW.

LEGAL AID. *See* COSTS.

LICENSING—*Drinking after hours by customers at public house—Waiters acting contrary to instructions—Liability of licensee—Summary Jurisdiction Act*, 1848 (11 *&* 12 *Vict. c.* 43), *s.* 5—*Licensing Act*, 1921 (11 *&* 12 *Geo.* 5, *c.* 42), *s.* 4.
Ferguson *v.* Weaving - **Divl. Ct. 814**

LOCAL GOVERNMENT—*Building—Works in contravention of by-laws—Notices to pull down—Validity—Premises let at rent not a rackrent—Whether lessee "owner"—Right to apply for extension of time for compliance with notices—Whether an appeal—Notice given more than twelve months from completion of works—Notice served on one-man company—Whether served on director individually — Trespass — General damages — Public Health Act*, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *s.* 65, *sub-ss.* 1, 3 *and* 4; *s.* 300, *sub-ss.* 1 *and* 3; *s.* 343, *sub-s.* 1—*Housing Act*, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 188, *sub-s.* 1—*Building Restrictions* (*War-Time Contraventions*) *Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 35), *s.* 1, *sub-s.* 1; *s.* 3, *sub-s.* 1 (*a*); *s.* 7, *sub-s.* 1.
Nalder *v.* Ilford Corporation - - **Sellers, J. 822**

2. —— *Contract for removal of local authority's refuse—Barges of prescribed type—Contractors to observe authority's by-laws subject to contract—New by-laws requiring barges of a different type—Whether repudiation of contract—Claim to rescission.*
Cory (William) & Son Ld. *v.* London Corporation - - **Lord Goddard, C.J. 8**

3. —— *Metropolis—Street trading—"Offering for sale" of article—Street photographer without licence—Agreement to sell photograph — Meaning of "offer" — London County Council* (*General Powers*) *Act*, 1947 (10 *&* 11 *Geo.* 6, *c. xlvi*), *s.* 15, *sub-s.* 1; *s.* 17, *sub-s.* 2; *s.* 29, *sub-s.* 1 (*a*).
Newman *v.* Lipman - - **Divl. Ct. 333**

4. —— *Superannuation—Employee's claim supported by employing rural district council—Superannuation fund maintained and administered by county council—Claim rejected by administering authority—"Authority concerned"—Local Government Superannuation Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 68), *ss.* 8, 35.
Walter *v.* Eton Rural District Council **C. A. 84**

MANDAMUS—*Alternative remedy—University—Domestic dispute—Question for Visitor—University of London Act*, 1926 (16 *&* 17 *Geo.* 5, *c.* 46), *ss.* 4, 5.
Rex *v.* Dunsheath; *Ex parte* Meredith **Divl. Ct. 127**

MASTER AND SERVANT—*Oral agreement of service for three years—No sufficient memorandum in writing—Wrongful dismissal—Agreement void—No concluded agreement for three years—Implied term that employment only terminable by reasonable notice—Statute of Frauds*, 1677 (29 *Car.* 2, *c.* 3), *s.* 4.
James *v.* Thomas H. Kent & Co. Ld. **C. A. 551**

2. —— *Use of dangerous substance in factory—Synthetic glue liable to cause dermatitis—Prophylactic not kept in shop although obtainable by workmen at store in factory—Duty of foreman — Welfare provision not safety provision—Safe system of work—Factories Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 42.
Clifford *v.* Charles H. Challen & Son Ld. - - - - - - **C. A. 495**

3. —— *See* Contract; National Insurance; Procedure; Revenue.

MERCHANDISE MARKS—*Applying false trade description to goods — "Non-brewed Vinegar"—Acting without intent to defraud—Sale of goods bearing false trade description—Vendor acting "innocently" — Merchandise Marks Act*, 1887 (50 *&* 51 *Vict. c.* 28), *s.* 2, *sub-ss.* 1 *and* 2.
Kat *v.* Diment - - - **Divl. Ct. 34**

METROPOLIS. *See* Local Government; Police.

MILK. *See* Food and Drugs.

NATIONAL INSURANCE—"*Employed person*"—"*Self-employed person*"—*Music-hall artiste—Employment under standard form of contract—National Insurance Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 (*a*) (*b*).
Gould *v.* Minister of National Insurance **Ormerod, J. 731**

2. —— *Fictitious insurance stamps—Possession without lawful excuse—Innocent purchase from unauthorized seller—Offence committed—Post Office Act*, 1908 (8 *Edw.* 7, *c.* 48), *s.* 65, *sub-s.* 1—*Industrial Injuries* (*Stamps*) *Regulations*, 1948 (*S.I.* 1948, *No.* 1443).
Winkle *v.* Wiltshire - - **Divl. Ct. 684**

NEGLIGENCE—*Highway—Horse jumping over hedge on to cyclist—Liability of owner.*
Brock *v.* Richards - - **C. A. 529**

2. —— *Nuisance—Personal injuries—Boy on highway injured by collapse of wall—Wall separating forecourt of house from public highway—House let on weekly tenancy—No right to enter reserved by landlord—Right to enter to be implied—Liability of landlord.*
Mint *v.* Good - - - **C. A. 517**

3. —— *See* Contract; Factory; Nuisance.

NUISANCE — *Obstruction of watercourse from natural causes—Obstruction not due to act or default of landowner—Notice from local authority to abate nuisance — Landowner's responsibility—Public Health Act*, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *ss.* 92, 93, 259.
NEATH R. D. C. *v.* WILLIAMS - - - **Divl. Ct. 115**

PLATE—*Gold and silver wares—Hall-mark —Statutory standards of fineness—Statutory requirement of hall-mark — Application to wedding rings and silver cigarette case— "Carat"—Meaning—Plate Act*, 1696 (8 *&* 9 *Will.* 3, *c.* 8), *s.* 9—*Plate Duty Act*, 1719 (6 *Geo.* 1, *c.* 11), *s.* 3—*Plate (Offences) Act*, 1738 (12 *Geo.* 2, *c.* 26), *ss.* 1, 5, 6, 22—*Gold Plate (Standard) Act*, 1798 (38 *Geo.* 3, *c.* 69), *ss.* 1, 2, 4, 6—*Gold and Silver Wares Act*, 1854 (17 *&* 18 *Vict. c.* 96), *ss.* 1, 4—*Wedding Rings Act*, 1855 (18 *&* 19 *Vict. c.* 60), *s.* 1—*Gold Wares (Standard of Fineness) Order*, 1932, (*St. R. & O.* 1932, *No.* 654).
WESTWOOD *v.* CANN - **Pritchard, J. 325**

POLICE (Metropolis)—*Right of search—Person reasonably suspected of "having or con-"veying" stolen property—Search in police station—Whether transit broken—False imprisonment—Arrest—Necessity to inform person arrested of grounds—Circumstances such that he must know nature of alleged offence— Metropolitan Police Act*, 1839 (2 *&* 3 *Vict. c.* 47), *s.* 66—*Prevention of Crimes Act*, 1871 (34 *&* 35 *Vict. c.* 112), *s.* 12.
WILLEY *v.* PEACE - - - **Divl. Ct. 94**

PRINCIPAL AND AGENT — *Factor — Mercantile agent—Second-hand motor car—Agent alleged to have obtained car by larceny by a trick—Registration book also obtained without consent of owner—Sale of car with book to bona fide purchaser—Purchaser's title—Factors Act*, 1889 (52 *&* 53 *Vict. c.* 45), *s.* 2, *sub-s.* 1.
PEARSON *v.* ROSE & YOUNG LD. **C. A. 275**

PROCEDURE — *Appeal from metropolitan magistrate—Defendant convicted and fined for obstruction—Order to enter into recognizances to be of good behaviour—Whether order made "on conviction"—Right of appeal—Criminal Justice Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 36, *sub-ss.* 1 *and* 2—*Metropolitan Police Act*, 1839 (2 *&* 3 *Vict. c.* 47), *s.* 54, *sub-s.* 6—*Justice of the Peace Act*, 1360 (34 *Edw.* 3, *c.* 1).
REX *v.* LONDON SESSIONS; *Ex parte* BEAUMONT - - - - - - **Divl. Ct. 557**

2. —— *Discovery — Interrogatories — Two defendants—Contribution or indemnity—No third-party procedure — Application by one defendant to interrogate the other—" Opposite "party"—Notice under R. S. C. Ord.* 16A, *r.* 12, *to be issued and served before application to interrogate.*
CLAYSON *v.* ROLLS ROYCE LD. AND EVANS LIFTS LD. - - - - - - **C. A. 746**

PROCEDURE—*continued.*
3. —— *Discovery — Plaintiffs' claim for damage to aircraft—Defendants insured against third-party risks—Whether defendants entitled to claim privilege for correspondence with their insurers—R. S. C., Ord.* 31, *r.* 19A (2).
WESTMINSTER AIRWAYS LD. *v.* KUWAIT OIL CO. LD. - - - - - - **C. A. 134**

4. —— *Master and Servant — Servant's claim to declaration that service agreement repudiated by master—Servant still in master's employment—R. S. C., Ord.* 25, *r.* 5.
HOWARD *v.* PICKFORD TOOL CO. LD. - **C. A. 417**

5. —— *See* DEFAMATION.

RAILWAYS—*Contract—Season ticket holder —Injury while about to enter train—Defective condition of platform near train—Duty of Executive to ensure reasonable safety of premises.*
PROTHEROE *v.* THE RAILWAY EXECUTIVE **Parker, J. 376**

RATING — *Derating* — "*Railway or canal "hereditament"—Premises used as warehouse for railway hotels—Transport Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 49), *s.* 2, *sub-s.* 1 (*e*)— *Local Government Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *s.* 85, *sub-s.* 1; *s.* 86, *sub-ss.* 1 *and* 2.
HOTELS EXECUTIVE *v.* DERBY CORPORATION **Divl. Ct. 91**

REVENUE—*Contract of service—P.A.Y.E.— Remuneration to be fixed sum per month— "Without any deductions and taxes, which "will be borne by the employers"—Words point to a gross sum—R.* 23 (2.) *of the All Schedules Rules in the First Schedule to the Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40)— *Question whether r.* 23 (2.) *applies to salaries —Income Tax (Employments) Act*, 1943 (6 *&* 7 *Geo.* 6, *c.* 45), *s.* 1.
JAWORSKI *v.* INSTITUTION OF POLISH ENGINEERS IN GREAT BRITAIN LD. - **C. A. 768**

2. —— *Purchase Tax—Conversion of army vehicle into shooting-brake—Finance (No. 2) Act*, 1940 (3 *&* 4 *Geo.* 6, *c.* 48), *s.* 18, *sub-s.* 1, *s.* 19, *sub-s.* 1; *Sch. VII, No.* 23—*Finance Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 64), *s.* 16, *sub-ss.* 1 *and* 3; *Sch. IV—Purchase Tax (Charges) (No.* 1) *Order*, 1947 (*St. R. & O.* 1947, *No.* 1182).
COLEBORN (T.) & SONS LD. *v.* BLOND **C. A. 43**

3. —— *Purchase tax—"Toys and games ". . . and appliances, apparatus, accessories "and requisites for sports, games, amuse- "ments . . . including parts thereof and "accessories thereto"—Constructional kits for model aircraft — Parts of model aircraft — Chargeability—Finance Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 49), *s.* 20; *Sch. VIII, group* 20 (1).
CUSTOMS AND EXCISE COMMISSIONERS *v.* E. KEIL & CO. LD. - **Croom-Johnson, J. 469**

ROAD TRAFFIC — *Dangerous driving — Notice of intended prosecution— Despatch by registered post to permanent address of defendant—Defendant in hospital to knowledge of police—Notice not received in fourteen days—Duty of police to act reasonably—Road Traffic Act*, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 21 (*c*).
HOLT *v.* DYSON - - - **Divl. Ct. 364**

2. —— *Drunk in charge of a bicycle—Whether bicycle a "carriage"—Licensing Act* (35 *&* 36 *Vict. c.* 94), *s.* 12.
CORKERY *v.* CARPENTER - - **Divl. Ct. 102**

3. —— *Insurance—Permitting uninsured vehicle to be driven on road—Vehicle accidentally not restored to cover after withdrawal for repair — Underwriters' acknowledgment of liability—"Special reasons" for non-disqualification—Road Traffic Act*, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 35, *sub-ss.* 1, 2.
PILBURY *v.* BRAZIER - - - - **Divl. Ct. 340**

4. —— *Tractor towing empty poultry shed on iron wheels—Failure to comply with regulations as to construction, weight and equipment—Whether poultry shed a trailer—"Land "implement"—Road Traffic Act*, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 1; *s.* 3, *sub-ss.* 1 *and* 3—*Motor Vehicles (Construction and Use) Regulations* (*St. R. & O.*, 1947, *No.* 670), *regs.* 3, 49, 50, 51, *and* 60.
GARNER *v.* BURR - - - **Divl. Ct. 31**

SALE OF GOODS—by Sheriff. *See* EXECUTION.

2. —— Car. *See* PRINCIPAL AND AGENT.

3. —— *See* DAMAGES.

SHIPPING—*Bill of lading—Oral contract of carriage—Bill not contract—Evidence of contract admissible—Deviation—Late delivery of fruit—Measure of damages—Loss of market.*
S.S. ARDENNES (CARGO OWNERS) *v.* S.S. ARDENNES (OWNERS) **Lord Goddard, C.J. 55**

2. —— *Charterparty—Cargo to consist of lawful general merchandise excluding acids, explosives, arms, ammunition "or other "dangerous cargo"—Construction—Ejusdem generis rule—Turpentine loaded with knowledge of master—Breach of charterparty—Dangerous cargo—Vessel ordered to unload in river into barges—Resulting delay—Damages for retention—Demurrage—Jurisdiction of arbitrator to award interest.*
CHANDRIS *v.* ISBRANDTSEN-MOLLER CO. INC. **Devlin, J. and C. A. 240**

3. —— *Charterparty—"Full reach and "burthen of the steamer including 'tween "and shelter decks, bridges, poop, etc. (pro"vided same are not occupied by bunker "coals . . .)"—Construction—Charterer's option to cancel charterparty if vessel not ready to load by specified date—Bunker coal in number 3 lower hold and number 3 'tween deck at cancelling date—Absence of mainmast and after derricks—Readiness to load.*
NOEMIJULIA STEAMSHIP CO. LD. *v.* MINISTER OF FOOD - - - - - **C. A. 223**

4. —— *Passenger steamer—Steamer carrying more than twelve passengers—Necessity for survey and certificate—Fishing vessel gratuitously carrying visitors to warship—Whether a passenger steamer—Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 267 *and* 271.
DUNCAN *v.* GRAHAM - - **Divl. Ct. 68**

SUMMARY JURISDICTION—*Appeal—Metropolitan magistrate — "Sum or penalty "adjudged to be paid more than three "pounds"—Right of appeal — Magistrate's order for forfeiture of goods prohibited from export—Costs exceeding three pounds awarded against claimants—Right of appeal against forfeiture order—Metropolitan Police Courts Act*, 1839 (2 *&* 3 *Vict. c.* 71), *s.* 50.
REX *v.* LONDON QUARTER SESSIONS; *Ex parte* BOWES - - - **Divl. Ct. 383**

TOWN AND COUNTRY PLANNING—*Compulsory acquisition of land—Assessment of compensation by arbitrator—Use of land by claimant contrary to planning control—Liability of land to enforcement order—Whether to be taken into account by arbitrator—Town and Country Planning Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 23, 51, 55, 75.
HIGHAM *v.* HAVANT AND WATERLOO URBAN DISTRICT COUNCIL - - **Divl. Ct. 509**

2. —— *Compulsory acquisition of site by local authority — Compensation — Rent-restricted flats demolished by enemy action—Notice to treat served on landlords before any war damage made good—Cost-of-works payment—Assessment of value of notionally rebuilt flats—Assumption that new tenancies not rent-restricted—Town and Country Planning Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 53, *sub-s.* 1 (*a*).
EAST END DWELLINGS CO. LD. *v.* FINSBURY BOROUGH COUNCIL - - - **C. A. 441**

3. —— *Land ripe for development—Owners' refusal to sell at existing use value—Compulsory purchase order by Central Land Board—Validity—Acquisition of land (Authorisation Procedure) Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 49)—*Town and Country Planning Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 43, *sub-ss.* 1, 2, 4.
EARL FITZWILLIAM'S WENTWORTH ESTATES CO. *v.* MINISTER OF TOWN AND COUNTRY PLANNING - - - - **Birkett, J. 203**

TOWN AND COUNTRY PLANNING—*cont.*

4. —— *Repair of war damage—Compulsory purchase of land—Proceedings by local authorities under Town and Country Planning Act,* 1944—*Direction by Minister for continuance after coming into force of Act of* 1947—*Validity—Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63), *s.* 37—*Town and Country Planning Act,* 1944 (7 *&* 8 *Geo.* 6, *c.* 47), *s.* 1—*Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *Sch. X, para.* 16.

Rex *v.* Minister of Town and Country Planning; *Ex parte* Montague Burton Ld. **C. A. 1**

TRESPASS—Damages. *See* Local Government.

WORKMEN'S COMPENSATION—*Pneumoconiosis—Employment as miner for thirty years to October,* 1946—*Woodworker until May,* 1949—*Certification in August,* 1949, *as totally incapacitated from May,* 1949—*Claim to compensation — Workmen's Compensation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 47—*Coal Mining Industry (Pneumoconiosis) Compensation Scheme,* 1943 — *National Insurance (Industrial Injuries) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 62), *s.* 89, *sub-s.* 1, *proviso* (*a*).

Holloway *v.* Mobberley and Perry Ld. **C. A. 316**

BIBL. LOVAIN UNIV.

UL 1 2 OCT 1973